(13)

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Title: Myra Jo Collins, Petitioner
v.
City of Harker Heights, Texas

Docketed:
January 31, 1991

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Rosen,Sanford Jay

Counsel for respondent: Barrett,Roy L.

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Entry	Date	Note	Proceedings and Orders
1	Jan 31 1991	G	Petition for writ of certiorari filed.
2	Mar 14 1991		Brief of respondent City of Harker Heights, Texas in opposition filed.
3	Mar 20 1991		DISTRIBUTED. April 12, 1991
4	Apr 1 1991	X	Reply brief of petitioner Myra Jo Collins filed.
5	Apr 15 1991		Petition GRANTED.
			**********
6	Apr 29 1991		Record filed.
		*	certified copy of C.A. proceedings received.
7	May 7 1991		Record filed.
		*	certified copy of original record
9	May 16 1991		Order extending time to file brief of petitioner on the merits until June 18, 1991.
10	Jun 18 1991		Brief amicus curiae of National Education Association filed.
11	Jun 18 1991		Brief amicus curiae of Association of Trial Lawyers of America filed.
12	Jun 18 1991		Joint appendix filed.
13	Jun 18 1991		Brief of petitioner Myra Jo Collins filed.
14	Jun 18 1991		Brief amici curiae of ACLU, et al. filed.
16	Jun 26 1991		Order extending time to file brief of respondent on the merits until August 9, 1991.
17	Aug 9 1991		Brief of respondent City of Harker Heights, Texas filed.
18	Aug 9 1991		Brief amici curiae of National League of Cities, et al. filed.
19	Aug 21 1991		CIRCULATED.
20	Aug 23 1991	D	Application (A91-152) to extend the time to file a reply brief from September 8, 1991 to September 17, 1991, submitted to Justice Scalia.
21	Aug 30 1991		Application (A91-152) denied by Justice Scalia.
22	Sep 5 1991		SET FOR ARGUMENT TUESDAY, NOVEMBER 5, 1991. (3RD CASE)
23	Sep 9 1991	X	Reply brief of petitioner Myra Jo Collins filed.
24	Sep 13 1991	G	Motion of petitioner to supplement the record filed.
25	Oct 21 1991		Motion of petitioner to supplement the record GRANTED.
26	Nov 5 1991		ARGUED.

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90-1879

No.

Supreme Court, U.S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

VS.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, when it alleges that the decedent's death resulted from the municipality's policy or custom of "deliberate indifference" to decedent's constitutionally protected rights under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, where the Estate alleges both (1) the municipality's deliberately indifferent policy or custom of failing to train, equip or supervise employees, and (2) a direct causal link between that municipal policy or custom and the constitutional deprivation?

As acknowledged by the Fifth Circuit in this case, there is a direct conflict between the Fifth Circuit's decision in the instant case, 916 F.2d 284, 290-291 (5th Cir. 1990), Appendix at A11-A13, and a recent decision of the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989).

2. Whether the Texas Hazard Communication Act, which requires all Texas employers (including municipalities) to inform and train their employees concerning workplace safety and to provide appropriate personal protective equipment, creates a substantive due process liberty interest or "entitlement" to be free from the very workplace hazards to which the Estate's decedent succumbed?

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 258 n.2 (1989), this issue was not reached by the Court because it was not raised below. This question also was not reached by the Court below, although it was properly raised below. 916 F.2d 284, 287-288 n.3 (5th Cir. 1990), Appendix at A6-A7 n.3.

PARTIES TO THE PROCEEDINGS

Counsel of record certify that the following listed persons have a direct interest in the instant case:

1. Myra Jo Collins, Petitioner, who was Plaintiff-Appellant below;

2. City of Harker Heights, Texas, Respondent, who was Defendant-Appellee below.

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No. ____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

VS.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The October 30, 1989 Order of the United States District Court for the Western District of Texas granting Defendant-Respondent's Motion to Dismiss is not published. It is reprinted in the Appendix at A14-A16. The District Court's October 31, 1989 judgment of dismissal is reprinted in the Appendix at A17.

The November 2, 1990 decision of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal, is published at 916 F.2d 284. It is reprinted in the Appendix at A1-A13.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 2, 1990. This Petition for Writ of Certiorari is filed within ninety (90) days therefrom, and

this Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of: (1) Section 1 of the Fourteenth Amendment to the Constitution of the United States and of (2) Section 1983, Title 42 U.S.C. are included in the Appendix at A18.

Relevant provisions of the Texas Hazard Communication Act, Texas Health and Safety Code, Sections 502.002 et seq. (Vernon 1990), are included in the Appendix at A19-A24.

STATEMENT OF THE CASE

Petitioner, Myra Jo Collins ("Collins"), Plaintiff and Appellant below, filed and served her Complaint on June 14, 1989. She alleged under 42 U.S.C. Section 1983 that Respondent, Defendant and Appellee below, the City of Harker Heights, Texas ("the City"), intentionally failed to train its employees and supervisors in, or to inform them of, workplace safety measures mandated by Texas statute and thereby manifested its policy of deliberate indifference to the constitutional rights of its employees. She further alleged that the City's policy of deliberate indifference directly caused the deprivation of her deceased husband Larry Michael Collins' ("the decedent's") substantive due process rights to life and liberty, in violation of the Fourteenth Amendment to the Constitution of the United States.

Collins' Complaint alleges the following facts which must be accepted as true:

(1) In July 1988 the decedent began working for the City in its Sanitation and Sewer Department. His job responsibilities included entering sewer mains through manholes to investigate sewer line problems. Complaint, pp. 2-3, ¶¶ 4-7 (Record at 6-7).

(2) The City provided the decedent no safety training whatsoever. No warnings or instructions were ever communicated or posted to alert him or other employees of the grave

hazards involved in entering the sewer lines; nor were employees instructed on how to protect themselves against these hazards. Although the City owned minimal safety equipment, including air blowers and safety ropes, Complaint, p.3, ¶ 8 (Record at 6), other rudimentary equipment, including gas meters, was lacking altogether, Complaint, p.3, ¶ 9 (Record at 6). Further, the City's employees were not trained or instructed on how to use the available equipment, advised of its importance, nor required or advised to use it. Complaint, p.3, ¶ 8 (Record at 6). The City's supervisors also were not instructed or required to use or have employees use safety equipment or measures. *Ibid.* The City's failure to train or warn violated the express provisions of the Texas Hazard Communication Act. Complaint, p.4, ¶¶ 14-19 (Record at 5). *See* Appendix at A19-A24.

(3) On October 21, 1988, the decedent was instructed by his supervisor to enter a manhole to try to unstop a clogged sewer line. The supervisor, and through him the City, had prior knowledge of the risks. Complaint, p.5, ¶ 2 (Record at 4). He entered the 18 foot manhole without harness, respirator, air blower, gas meter or any other safety device. He lost consciousness, and died of asphyxia due to suffocation (oxygen deprivation) before he could be removed. Complaint, pp. 3-4, ¶¶ 11-12 (Record at 5-6).

(4) The Complaint specifically states that:

1. Prior to October, 1988, the custom, policy and procedure of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a custom to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.

2. Prior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months

before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, the Hazardous Communications Act became effective January, 1986, which imposed a burden on the City of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a custom and policy to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.

5. The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death.

* * *

Causal Connection

The City of Harker Heights' policy and procedure not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their [sic] policy and procedure to not train employees in the use of proper safety equipment required by the State law and policy and custom not to require the safety equipment to be on hand or used at the job site were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.

Complaint, pp. 5-7 (Record at 2-4).

STATEMENT OF PROCEDURAL HISTORY

On July 7, 1989, the City filed a motion to dismiss Collins' Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for her purported failure to state a claim upon which relief could be granted. Collins filed her Response to the City's motion to dismiss on August 24, 1989; the City filed its Reply on August 30, 1989.

Without hearing or oral argument, on October 30, 1989, the District Court issued its Order dismissing Collins' complaint. Collins filed a Supplemental Brief in opposition to the City's motion to dismiss on October 31, 1989. Judgment was entered on October 31, 1989. Collins timely filed her Notice of Appeal on or about November 16, 1989.

On November 2, 1990, the Fifth Circuit affirmed the judgment of dismissal, expressly on the ground that "pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action will not lie." 916 F.2d. at 285, Appendix at A2. The Fifth Circuit further stated that for purposes of a Rule 12(b)(6) motion, although not pleaded expressly:

> an abuse of government power . . . [or] that the City's conduct was of a unique governmental character . . . *was pleaded sufficiently*. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.
>
> 916 F.2d at 290 n.7, Appendix at A11 n.7 (Emphasis added).

In fact, under Texas statute, sewer work is exclusively a governmental function. *See* Civil Practice and Remedies Code, Section 101.0215 (Vernon 1990).

In reaching its decision the Fifth Circuit specifically recognized that its decision and holding, and the Fifth Circuit decisions upon

which it relied, conflicted sharply with a recent decision of the United States Court of Appeals for the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). *See* 916 F.2d at 290-291, Appendix at A11-A13.

In their opinions both the Court below and the Eighth Circuit analyzed and relied upon this Court's recent decision in *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed.2d 412 (1989), in which this Court adopted and applied the standard of "deliberate indifference to constitutional rights," and held that certain "failure to train" claims may be asserted under Section 1983 against municipalities by or on behalf of persons who are physically injured by municipal employees acting "under color of State law." In *Ruge* the Eighth Circuit did just the opposite of what the Fifth Circuit did here. Specifically applying the *Harris* decision's "deliberate indifference" standard, the Eighth Circuit *reversed* a district court Order sustaining a Rule 12(b)(6) motion to dismiss a Section 1983 "failure to train" complaint by the estate of a municipal sewer worker against his municipal employer.

In discussing *Ruge*, the Fifth Circuit in the instant case expressly acknowledged that:

> *We are unable to find sufficient shades of difference with the Ruge holding to allow us not to find it conflicts with our controlling precedent. Ruge* might compel [a] finding here that the alleged municipal policy is an abuse of governmental authority or, stated differently, conduct that was of a 'unique governmental character,' sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree.
>
> 916 F.2d at 290-291, Appendix at A13 (Footnote omitted; emphasis added).

Furthermore, the Fifth Circuit also observed that:

> [b]ecause our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge*, not this court *created an inter-circuit conflict*, we have not sought *en banc* consideration by this court prior to rendering this decision.
>
> 916 F.2d at 291 n.10, Appendix at A13 n.10 (Emphasis added).

The Fifth Circuit also specifically held that it need not reach the issue of "whether there was a deprivation of a constitutional right" enjoyed by decedent. 916 F.2d at 287, Appendix at A6. This question was reached by the Eighth Circuit in *Ruge* and decided in favor of plaintiff. *See* 892 F.2d at 738. In particular, the Fifth Circuit did not reach the questions whether the Texas Hazard Communication Act (Appendix at A19-A24) conferred upon the decedent an entitlement to be provided with safety measures by his municipal employer nor whether such entitlement would enjoy due process protection as a liberty interest. The Fifth Circuit acknowledged that, unlike the situation before this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 103 L.Ed.2d 249, 258 n.2 (1989), the issue was properly raised below in the Complaint and in briefs and arguments before it. 916 F.2d at 287-288 n.3, Appendix at A6-A7 n.3.

REASONS FOR GRANTING THE WRIT

I

There is a Direct Conflict in the Circuits on the Questions Presented, Which Should be Resolved by this Court

As recognized by the Fifth Circuit in the instant case, the Eighth Circuit's recent decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), conflicts directly with the decision below and with the Fifth Circuit's earlier decision in *Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444 (5th Cir. 1985).

In *Ruge* the Eighth Circuit relied upon this Court's recent decision in *City of Canton, Ohio v. Harris*, 489 U.S. ____, 103 L.Ed.2d 412 (1989), in which this Court applied the "deliberate indifference to constitutional rights" standard to certain Section 1983 failure to train claims against municipalities. *Ruge*, 892 F.2d at 740. As the *Ruge* Court observed, in *Harris*:

> [This] Court determined that for a policy of a municipality to provide the basis for a violation of substantive due process it must be shown: (1) that the policy is inadequate; (2) the adoption of such a policy reflects a deliberate indifference to

> the constitutional rights of the plaintiff; and (3) the policy caused a violation of the plaintiff's constitutional rights.
>
> *Id.* at 740.

Analyzing these requirements, and specifically relying on the *Harris* decision, the Eighth Circuit held, as to the claims of the estate of a deceased municipal sewer employee: ". . . that a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens [including its employees], would reach constitutional dimensions and be actionable [as state action] under the Civil Rights Act." *Id.* at 742. As the Eighth Circuit held:

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n. 6.

Unlike the Court below, in *Ruge* the Eighth Circuit also reached the question "whether there was a deprivation of a constitutional right" enjoyed by decedant, and decided that such a deprivation was properly pleaded. *Compare Collins*, 916 F.2d at 267, Appendix at A7 *with Ruge*, 892 F.2d at 738. *See also, Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989) (by implication).

Although conflicting directly with *Ruge*, particularly on the first "Question Presented" herein, the decision in the instant case is a reaffirmation by the Fifth Circuit of its earlier, pre-*Harris* decision in *Rankin v. Wichita Falls, Texas*, 762 F.2d 744 (5th Cir. 1985), which also involved the death of a municipal sewer worker. The decision below also is consistent with and relied on two other Fifth Circuit decisions involving claims by jail detention officers for injuries they suffered *from prisoners* (*Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987) and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989)) and two such decisions from other Circuits (*Washington v. District of Columbia*, 802

F.2d 1478 (D.C. Cir. 1986) and *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986)). But these four decisions are not truly apposite, as in each of those cases intervening private actors, *i.e.*, prisoners, were the "intervening efficient" cause of each plaintiff's injuries. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ____, 103 L.Ed.2d 249 (1989).

Notably, in *Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989), the Third Circuit decided that this distinction was crucial. In *Stoneking*, on remand from this Court for reconsideration in light of *DeShaney* (103 L.Ed.2d 804 (1989)), the Third Circuit reaffirmed a district court's denial of a defendant School District's summary judgment motion, despite *DeShaney*, on the ground that the acts complained of in *Stoneking*, sexual harassment of the student by a teacher, were perpetrated by a state employee, rather than a private person.

The only other Circuit even to have approached squarely addressing the questions raised in this Petition is the Second Circuit, in *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986). The *McClary* decision, like the Fifth Circuit's decision in *Rankin*, preceded this Court's decisions in *Harris* and *DeShaney*.

In *McClary*, the Second Circuit affirmed the granting of a Rule 12(b)(6) motion to dismiss a Section 1983 wrongful death claim brought by the estate of a county highway department employee against state and county officials. "The actual holding in *McClary* is that the decedent's death was not caused by any established state procedure and therefore did not constitute a constitutional deprivation. 786 F.2d at 87." *Ruge*, 892 F.2d at 741. Lack of foreseeability (which was alleged here and in *Ruge*), was another problem in *McClary*. *See McClary*, 786 F.2d at 87, citing *Parratt v. Taylor*, 451 U.S. 527 (1981).

As correctly explained by the Eighth Circuit in *Ruge*, anticipating this Court's decision in *Harris*, the *McClary* Court stated that:

> . . . we by no means intend to exclude grossly negligent, reckless, or intentional abuse of *governmental* authority from the purview of Section 1983. . . . Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to

> their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under Section 1983.
>
> *McClary*, 786 F.2d at 89 n.6.

The decision below appears inconsistent at least with the implications of a recent Eleventh Circuit decision, *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989). In *Cornelius*, the Eleventh Circuit reversed a district court's granting of defendants' (Town officials') motion for summary judgment. The Eleventh Circuit distinguished *DeShaney* on the ground that the Town officials had created the danger to plaintiff, the Town Clerk, by contracting to obtain inmate labor, accepting inmates assigned to them and undertaking to supervise the inmates while they worked around the Town Hall *in which plaintiff was required by defendants to work*. *Compare Collins*, 916 F.2d at 288-289, Appendix at A8-A9, quoting *Rankin*. By implication, the Eleventh Circuit also applied the *Harris* standard to the facts in *Cornelius*, involving the Section 1983 claim of a municipal employee against the municipality.

The conflicts among the Circuits on the questions here thus are manifested as follows: (1) There is a clear conflict between the decisions of the Fifth Circuit in the instant case and *Rankin* with the decision of the Eighth Circuit in *Ruge*; (2) at least by implication, the Fifth Circuit position also conflicts with those of the Second Circuit in *McClary*, the Eleventh Circuit in *Cornelius* and the Third Circuit in *Stoneking*; (3) on the other hand, *Ruge* conflicts with implications of pre-*Harris* and *DeShaney* decisions in the District of Columbia and Seventh Circuits in *Washington* and *Walker*, and *Ruge* conflicts with implications of the Fifth Circuit's pre-*Harris* and *DeShaney* decisions in *Hogan* and its post-*Harris* and *DeShaney* decision in *de Jesus Benavides*.

Surely the questions presented are ripe for this Court's review.

II

This Case Raises Important Recurring Questions of Federal Constitutional Law that are Unresolved and that Should be Resolved by this Court

The existence of the direct conflict between the Fifth Circuit's decision in this case and the Eighth Circuit's decision in *Ruge* demonstrates that this case raises as yet unresolved questions of the scope of 42 U.S.C. Section 1983, and the nature of the substantive due process rights of municipal employees. The above-recited implicit conflicts among the Circuits demonstrate the lack of resolution as well.

The importance of settling the serious questions presented is obvious, and further demonstrates that they ought promptly to be resolved by this Court. After all, potentially, the rights of tens of millions of public employees are on the line; as are the treasures of tens of thousands of municipalities.

Moreover, further clarification by this Court is necessary generally concerning the reach and applicability of the *Harris* standard. This Court should also decide whether, as held by the Fifth Circuit in the instant case and in *de Jesus Benavides*, this Court's decision in *DeShaney* is intended to preclude government employees from asserting, under Section 1983, essentially any and all possible claims against their employers for job related injuries violative of substantive due process. *Compare, e.g., Ruge, Stoneeking* and *Cornelius*.

If this is to be so, only this Court can explain with finality why the same municipality that can be sued by its employees under Section 1983 for trauma resulting from sexual or racial discrimination or harassment, or for violating its employees' First Amendment or procedural due process rights or state defined property rights (*see, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Board of Regents v. Roth*, 408 U.S. 564 (1972)), cannot be sued under Section 1983 for trauma or death resulting from a municipality's policy or custom of deliberate indifference to the physical safety of its employees.

Significantly as well, other Circuits have taken this Court's "deliberate indifference" standard, as stated in *Harris*, and applied it in divers contexts to delimit a public entity's potential liability under Section 1983. For example, in *Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1990), which involved a First Amendment wrongful termination claim, the Tenth Circuit applied *Harris*' "deliberate indifference" standard in assessing "whether the requisite 'direct causal link' exists between the alleged constitutional deprivation and the [school] board's decision, as final policy maker, to fire Ware." 902 F.2d at 817. Applying the *Harris* standard, over sharp dissent, the Tenth Circuit reversed the district court's granting of a directed verdict to the board. Only this Court can settle whether the *Harris* standard has such universal application.

Implicit in the Fifth Circuit's analysis and decision below is the lingering concern, apparently shared by this Court, that allowing complaints, such as the one in the instant case, under Section 1983 improperly would federalize common law torts and trivialize federal constitutional protections. *See, e.g.*, 916 F.2d at 288-290, Appendix at A8-A11. *See also, Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986). As the Eighth Circuit's *Ruge* decision makes plain, strict application of the *Harris* "deliberate indifference" standard is sufficient protection from any such tendency and strikes the proper balance between protection of federal constitutional rights and avoidance of federalizing the common law of tort.

Given the conflict among the Circuits and continued confusion as to this Court's intentions, only this Court can give proper meaning to its observation that:

> More important, the difference between one end of the spectrum—negligence—and the other end—intent—is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.
>
> *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

Finally, only this Court can properly decide the important question reserved by this Court in *DeShaney*, 103 L.Ed.2d at 258 n.2, and not reached by the Court below, 916 F.2d 287-288 n.3, Appendix at A6-A7 n.3, but squarely before the Court here, *i.e.*, whether the Texas Hazard Communication Act gave decedent "an entitlement to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972)." 103 L.Ed.2d at 258 n.2.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: January 28, 1991

Respectfully submitted,

SANFORD JAY ROSEN
Attorney of Record

APPENDIX

Myra Jo Collins,
Plaintiff-Appellant,

v.

The City of Harker Heights, Texas,
Defendant-Appellee.

No. 89-8029.

United States Court of Appeals,
Fifth Circuit

Nov. 2, 1990.

Widow of city sewer worker, who entered manhole to clear line and died of asphyxia before he could be removed, brought civil rights suit against city. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed for failure to state claim, and widow appealed. The Court of Appeals, Barksdale, Circuit Judge, held that city sewer worker did not die as a result of any abuse of government power, and thus, widow could not maintain § 1983 action against city.

Affirmed.

1. Civil Rights

City sewer worker, who was instructed to enter manhole to clear a line and who died of asphyxia before he could be removed, did not die as a result of any abuse of government power and, thus, widow of worker could not maintain § 1983 action against city. 42 U.S.C.A. § 1983.

2. Civil Rights

Mere negligence is insufficient to establish municipal liability under § 1983. 42 U.S.C.A. § 1983.

3. Civil Rights

In suit against municipality, as employer, under § 1983 for alleged failure to train employee, showing of direct causal link between municipal policy or custom and alleged constitutional

deprivation is not sufficient in itself; a separate standard of "abuse of government power" must also be satisfied. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Myra Jo Collins appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her § 1983 action, which alleges that the failure of the City of Harker Heights, Texas, to adequately train its employees was a policy of deliberate indifference to her deceased husband's constitutional rights. Pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action does not lie. Accordingly, we AFFIRM.

I.

According to Collins' complaint, her husband began working in July 1988, for the City in its sanitation and sewer department, including entering sewer mains through manholes when there was a sewer line problem. In October 1988, as instructed, he entered a manhole to clear a line and died of asphyxia before he could be removed.

Collins alleged that: her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communications Act; and, *inter alia*, this pattern of behavior by the City was

a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees.[1]

The district court granted a Rule 12(b)(6) dismissal, expressly taking into consideration the applicable causation standard ("deliberate indifference to constitutional rights") set by *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 57 L.Ed. 1232 (1989), but noting that an "abuse of governmental power" was lacking, stating first:

> The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. In this case the deceased was not in the custody of the [City], he was an employee.

(Citations omitted.) It next ruled that a municipality's improper action against its employee does not constitute *ipso facto* deprivation of a constitutional right; and held that because a constitutional right had not been violated, an action under § 1983 could not lie.

II.

The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among those necessary for bringing § 1983

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[1] Collins also pleaded state law claims.

into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.[2]

Section 1983 provides in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, . . . secured by the Constitutional and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983. In *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a § 1983 action could lie against a municipality only where it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where "constitutional deprivations [occurred] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91, 98 S.Ct. at 2035-36.

Earlier, in *Paul v. Davis*, 424 U.S. 693 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court rejected the idea that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699, 96 S.Ct. at 1159. Furthermore, mere negligence is insufficient to establish municipal liability under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986).

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[2] Of course, in reviewing the dismissal we must accept as true all well-pleaded averments and view them in the light most favorable to the plaintiff; "[w]e may uphold . . . [Rule 12(b)(6) dismissal] only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Baton Rouge Bldg. and Constr. Trades Council v. Jacobs Construction, Inc.*, 804 F.2d 879, 881 (5th Cir.1986); *see also Rankin v. City of Wichita Falls*, 762 F.2d 444, 446 (5th Cir.1985).

As stated fairly recently by the Supreme Court in the above-cited *City of Canton, Ohio v. Harris*, the "first inquiry in any case alleging municipal liability under § 1983 is . . . whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." 109 S.Ct. at 1203. *City of Canton* concerned a § 1983 action for violation of an alleged Fourteenth Amendment right to receive proper medical attention while in post-arrest police custody, arising in part out of inadquate training of the custodial police officers concerning when to summon medical care for a detainee. For such failure to train cases, the Supreme Court noted there was "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted" and held that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204 (emphasis by Court).

City of Canton does not permit all municipal failure to train actions to lie under § 1983, as is reflected by the court's restatement of its holding:

> Consequently, while claims such as [the detainee's]—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

Id. at 1206. *City of Canton* arises out of the use, or abuse, of government power; the holding springs from a citizen being held in custody after arrest, without the ability to control or choose a necessary course of action and being dependent upon the government to do so. The holding establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. In this Circuit, there is a separate standard that must also be satisfied—an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary

elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City—one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a § 1983 action—whether there was a deprivation of a constitutional right.[3]

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[3] For such deprivation, the complaint alleges that the decedent "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City['s] . . . custom and policy of deliberate indifference toward the safety of its employees"; that the obvious need for proper training and use of safety equipment, especially as mandated by the Texas Hazard Communication Act, Tex. Health & Safety Code Ann. § 502.001 et seq. (Vernon 1990), and the concomitant failure to do so, "result[ed] in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death." In her initial brief, Collins contends, for example, that "a public employee enjoys a life or liberty interest in freedom from unsafe working conditions"; that the Texas Hazard Communication Act, by "confer[ring] on public as well as private employees the right to be free from hazardous, unsafe working conditions," has "create[d] affirmative rights for all employees in the State of Texas, including municipal employees, . . . a liberty interest in a work place free of the very hazards to which the decedent succumbed"; that "[i]t is well-established that deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983"; and that therefore, "[p]ublic employees in the State of Texas. . . . have a substantive due process liberty interest in a safe workplace." *See, e.g., DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2, 103 L.Ed.2d 249 (1989) (issue raised but not considered). At oral argument, Collins' counsel stated that this right to a safe workplace was the equivalent of a substantive due process right to life. Because we do not reach this issue, we express no opinion on it.

Collins contends that pursuant to *City of Canton*, her claim is sufficient to withstand Rule 12(b)(6) dismissal. But, as discussed above, Collins reads too much into *City of Canton*. It pertained to cases concerning use of governmental power on the governed, to government qua government, consistent with the reminder in *Daniels* that

> [o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states,' " *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct. 1908, 1917, 68 L.Ed.2d 420].

454 U.S. at 332, 106 S.Ct. at 665. Collins has received payments pursuant to the worker's compensation law of Texas;[4] and we express no opinion whether she might have a cause of action under state law.[5] In any event, and as held repeatedly in controlling precedent in this Circuit, she does not have a § 1983 claim against the City. Such precedent is found, for example, in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir.1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir.1987); and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989) (rendered after *City of Canton* and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)).

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[4] Needless to say, the receipt of such payments, evidenced, for example, by an affidavit filed with the City's Rule 12 motion, has no bearing on whether under Rule 12(b)(6), a § 1983 action can lie in this instance.

[5] The dismissal included her pendent state law claims.

In *Rankin*, a situation tragically similar to the case at hand, a municipal water treatment plant employee drowned while attempting to save another who had fallen into one of the tanks. The action against the city charged that work site safety defects constituted a municipal custom and practice which caused a deprivation of a constitutional right. This court affirmed the dismissal of the complaint for failing to state a claim under § 1983. Because the case predated *City of Canton's* fixing the causation standard, the court assumed that the complaint sufficiently alleged conduct to meet "whatever standard . . . is necessary to state a constitutional claim under section 1983." 762 F.2d at 447.

However, the court explained that simply alleging, or meeting, a causation standard for cases such as this is not enough to permit an action under § 1983.

> While some degree of government 'fault' is necessary to state a claim under the Constitution, to predicate liability under section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of state law.

Id. at 447-448. Accordingly, the court found possible § 1983 liability wanting, "because the existence of the alleged work place defects . . . did not amount to a misuse of government power. . . ." *Id.* at 449. The court further explained this controlling distinction:

> The City acted in this case in a role essentially indistinguishable from the role of a private employer; accordingly, we cannot view the City's failure to redress the patent but possibly severe defects in [the decedent's] workplace as an abuse of government power. [The decedent's] association with the treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been. This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state, nor are state representatives alleged to have violated the special obligation

> of government to refrain from intentional violations of constitutional rights.

Id. at 449. The court held that "the plaintiffs have made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law." *Id.* at 447, 449 (emphasis added).[6]

In *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987), also rendered before *City of Canton*, a police officer alleged that city policies allowed a prisoner to seize another officer's gun and shoot the plaintiff officer; that these policies "manifest[ed] deliberate indifference to or conscious disregard" for his safety. This court affirmed the Rule 12(b)(6) dismissal by applying the *Rankin* holding that the complaint failed to allege the requisite abuse of government power.

And, in *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989), decided after *City of Canton*, this court applied the *Rankin* analysis to a § 1983 claim by jail detention officers, injured by inmates during an attempted escape. In doing so, it also applied similar decisions from other Circuits and the then recent decision by the Supreme Court in *DeShaney*, handed down only six days before *City of Canton*. *DeShaney* involved a § 1983 action against a governmental entity and its employees (the government) for child abuse injuries; it was alleged that the government's failure to protect the child from his custodial father constituted a Fourteenth Amendment substantive due process violation. Although, obviously, *DeShaney* did not involve the employment relationship in issue here, it is applicable because it holds that not all injuries arising out of an association or relation-

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[6] In addition to relying on *City of Canton*, Collins attempts to distinguish *Rankin* because it did not address whether the regulations allegedly violated by the municipality created a constitutional right. As discussed earlier, including in note 3, this argument does not concern the controlling issue in this case, abuse of government power; it concerns a separate issue or standard—deprivation of a constitutional right—that we do not reach.

ship with the government give rise to a § 1983 claim, even if all other elements for that claim are present.

One contention in *DeShaney* was that because the government was aware of the danger to the child and took some action to protect him, it acquired a duty to do so in a proper manner, and the failure to do so was an abuse of governmental power that constituted a substantive due process violation. In rejecting the contention, the Court noted it was "true that in certain limited circumstances the Constitution imposed upon the [government] affirmative duties of care and protection with respect to particular individuals," but this arose only

> when the [government] takes a person into its custody and holds him there against his will, [it is then that] the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the [government] by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . In the substantive due process analysis, it is the [government's] affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1004-1006 (citations omitted).

Accordingly, this court stated in *Benavides* that *DeShaney* "confirm[ed] the rationale of several of our similar recent cases," including *Rankin* and *Hogan*. 883 F.2d at 387. Based upon the facts in *Benavides*, this court noted that

> prison guards are employees who "enlisted, on terms they found satisfactory, and [who] were free to quit whenever

> they pleased." *Washington [v. District of Columbia]*, 802 F.2d [1478, 1482 (D.C. Cir.1986)]; *Walker [v. Rowe,]* 791 F.2d [507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 [107 S.Ct. 597, 93 L.Ed.2d 597] (1986)]. We applied the same rationale in *Rankin* when we noted that the plaintiffs' decedent's "association with the [defendant city's] treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been."

883 F.2d at 388.

Collins contends that the determinative factor making this a proper post-*City of Canton* § 1983 action is simply that the defendant is "*a governmental body*" (emphasis by Collins); that we should "not . . . focus on the relationship between the public entity and the injured or deceased person"; that the alleged deliberate indifference, without more, constitutes the necessary "abuse of governmental authority"; and that the strict, or high, causation standard fixed by *City of Canton* removes the concerns that lead to establishing the abuse of government power standard. As part of, or alternative to, her contention that the abuse of government power standard employed by *Rankin* and other cases was replaced, or subsumed, by the *City of Canton* causation standard, Collins asserts that even if an abuse of government power must be alleged, she has done so sufficiently for Rule 12(b)(6) purposes, relying, in part, on the recent Eighth Circuit holding in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir.1989).[7]

In *Ruge*, the § 1983 action alleged that the City had a deliberate policy of not shoring ditches and required employees to work in them without warning of such danger. For Rule 12(b)(6) dismissal, the city urged the court to apply the reasoning from

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[7] Although Collins did not expressly plead an abuse of government power, or plead to the effect that the City's conduct was of a unique governmental character, we find for purposes of our discussion and in light of our standard of review for Rule 12(b)(6) dismissals that this necessary element for a § 1983 action of this type was pleaded sufficiently. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.

Rankin and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir.1986), "that in an employer-employee relationship where the plaintiff fails to show the state conduct complained of was of a 'uniquely governmental character' there is no abuse of government authority and thus no improper state action." 892 F.2d at 741.

The *Ruge* court, however, distinguished *McClary*, ruling that *McClary* held instead that the death "was not caused by any established state procedure and therefore did not constitute a constitutional deprivation."[8] *Id.* The *Ruge* court discussed, but did not attempt to distinguish, *Rankin*.

Ruge reversed the Rule 12(b)(6) dismissal, holding that "an abuse of government authority arises sufficient to state a cause of action under section 1983," when a death, including of a municipal employee, is caused by an inadequate municipal policy, adopted with the requisite culpability." *Id.* at 741 n. 6. In so holding, the court stated:

> However, where the state simply commits a tort, there is no misuse of government power when "the event, however tragic, was an accident neither the occurrence of which nor the particular victim of which could have been predicted." *McClary*, 786 F.2d at 87. We deem a policy, if adopted and proven, that would show a city *actively pursued* conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act. *See City of Canton*, 109 S.Ct. at 1204.

Id. at 742 (emphasis added).

We are unable to find sufficient shades of difference with the *Ruge* holding to allow us to not find it in conflict with our controlling precedent.[9] *Ruge* might compel finding here that the alleged municipal policy is an abuse of government authority or, stated differently, conduct that was of a "uniquely government character," sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree. Furthermore, we are bound by our controlling Fifth Circuit precedent. As demonstrated, it has not been changed by a Supreme Court decision; in fact it is solidified by that Court's decisions.[10]

There was no abuse of government power. This is not an instance "when the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*, 109 S.Ct. at 1005. It is "not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual." *McClary*, 786 F.2d at 89. Nor was there "a misuse of power made possible only because the City [was] clothed with authority of state law." 762 F.2d at 449. Accordingly, this action cannot lie under § 1983.

III.

The judgment of the district court is AFFIRMED.

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[8] Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated:

> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.

786 F.2d at 89 n. 6 (emphasis added).

[9] As emphasized in the passage quoted above, one difference might be its seeming to include the requirement that the city "actively pursue" deliberately indifferent conduct. 892 F.2d at 742.

[10] Because our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge* not this court, created an inter-circuit conflict, we have not sought en banc consideration by this court prior to rendering this opinion.

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 30 1989]

ORDER

On this day came on to be considered the Defendant's motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) in the above-styled and numbered cause. The Court, having considered the motion, is of the opinion that it is meritorious and should be granted.

Plaintiff is the widow of Larry Michael Collins, a former employee of the City of Harker Heights, Texas. Mr. Collins died on October 21, 1988 when he was asphyxiated by poisonous gases while working in a sewer line. Plaintiff brings suit under 42 U.S.C. § 1983, alleging that her husband's death resulted from the Defendant's violation of his federally protected constitutional rights. Plaintiff contends that Defendant's failure to train and warn its employees of the dangers associated with working in a sewer line represented a conscious indifference to her husband's constitutionally protected rights. Plaintiff further alleges that the conduct of Defendant establishes a policy or custom of placing its employees in deadly situations without proper safety precautions. Defendant has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be

dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

In order for a claim to exist pursuant to 42 U.S.C. § 1983 it is necessary that the Plaintiff be deprived of a federally protected right by a person acting under color of state law. A municipality can be held liable under § 1983 "when the execution of the government's policy or custom . . . inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). It is not necessary that the government policy or custom be reduced to a written procedure. It is enough that the act which inflicts the injury be representative of official policy. *Id.* at 694.

The first question in any case alleging municipal liability under § 1983 is whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris*, ____ U.S. ____, 109 S.Ct. 1197, 1203 (1989). Only when a municipality's failure to train its employees evidences a "deliberate indifference" can such a shortcoming be considered a city "policy or custom" that is actionable under § 1983. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

The degree of culpability required to find a violation of due process cognizable under § 1983 is something more than a negligent act. The Due Process Clause is simply not implicated by negligence or the mere lack of due care of an official causing unintended injury or loss of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328-329, 106 S.Ct. 662, 663 (1986). Failure to train employees can only serve as the basis for liability under § 1983 when it amounts to a deliberate indifference to the rights of pesons effected and when that failure to train is the moving force behind the constitutional violation. *City of Canton*, ____ U.S. ____, 109 S.Ct. at 1205.

In this case the Plaintiff has alleged that the Defendant acted with deliberate indifference. The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. (*See City of Canton, Ohio v. Harris*, ____ U.S. ____, 109 S.Ct. 1197 (1989); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).) In this case the deceased was not in the custody of the Defendant, he was an employee. The Second Circuit has held that even deliberate exposure of public employees to a "high risk" does not violate the constitution because it is not an abuse of governmental power. *McClary v. O'Hare*, 786 F.2d 83 at 88 (2nd Cir. 1986). Improper actions by an employer do not violate the employee's constitutional rights simply because the employer is a governmental official. *Id.* at 89. In this case the acts of the Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right, which is required to find the city liable under § 1983. Accordingly,

IT IS ORDERED that the Motion of Defendant City of Harker Heights to Dismiss is GRANTED.

SIGNED this 30th day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 31, 1989]

JUDGMENT

In accordance with the Order of this Court entered on this day granting Defendant's Motion to Dismiss, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is DISMISSED.

SIGNED this 31st day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

Constitutional Provisions and Statutes

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Texas Hazard Communication Act, Health and Safety Code (Vernon 1990):

§ 502.002. Findings; Purpose

(a) The legislature finds that:

(1) the health and safety of persons living and working in this state may be improved by providing access to information regarding hazardous chemicals to which those persons may be exposed during normal employment activities, during emergency situations, or as a result of proximity to the manufacture or use of those chemicals; and

(2) many employers in this state have established suitable information programs for their employees and that access to that information is required of all manufacturing employers under the federal Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard.

(b) It is the intent and purpose of this chapter to assure that, if the OSHA standard is not in effect, accessibility to information regarding hazardous chemicals is provided to:

(1) employees who may be exposed to those chemicals in manufacturing or nonmanufacturing employer workplaces;

(2) emergency service organizations responsible for dealing with chemical hazards during an emergency; and

• • •

§ 502.003. Definitions

In this chapter:

* * *

(9) "Employee" means a person who may be or may have been exposed to hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies, and includes a person working for this state, a person working for a political subdivision of this state, or a member of a volunteer emergency service organization. The term does not include an office worker, a ground maintenance worker, security personnel, or nonresident management unless the person's job performance routinely involves potential exposure to hazardous chemicals.

(10) "Expose" or "exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption. The term includes potential, possible, or accidental exposure.

* * *

(12) "Hazardous chemical" means an element, chemical compound, or mixture of elements or compounds that is a physical hazard or health hazard as defined by the OSHA standard in 29 CFR Section 1910.1200(c), or a hazardous substance as defined by the OSHA standard in 29 CFR Section 1910.1200(d)(3).

* * *

(16) "Nonmanufacturing employer" or "employer" means an employer with a workplace in Standard Industrial Classification (SIC) Codes 46-49 (pipelines, transportation services, communications, and electric, gas, and sanitary services), 51 (wholesale trade, nondurable goods), 75 (automotive repair, services, and garages), 76 (miscellaneous repair services), 80 (health services), 82 (educational services), and 84 (museums, art galleries, and botanical and zoological gardens); this state and its political subdivisions;

and volunteer emergency service organizations. If the OSHA standard is not in effect, "employer" also includes manufacturing employer.

* * *

§ 502.010. Employee Education Program

(a) An employer, shall provide, at least once a year, an education and training program for employees who use or handle hazardous chemicals.

(b) Not later than the 30th day after an employer provides an education and training program, the employer shall report to the commissioner that the program has been provided to the employees.

(c) An employer shall provide additional instruction to employees when the potential for exposure to hazardous chemicals changes or when the employer receives new and significant information concerning the hazards of a chemical.

(d) An employer shall provide training to a new or newly assigned employee before the employee works with or in a work area containing a hazardous chemical.

(e) An employer shall keep a record of the dates of training sessions given to employees.

(f) An education and training program must include, as appropriate:

(1) information on interpreting labels and MSDSs and the relationship between those two methods of hazard communication;

(2) the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees;

(3) protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and

(4) general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals.

(g) As part of an outreach program created in accordance with Section 502.009, the commissioner shall develop an education and training assistance program to assist employers who are

unable to develop the programs because of size or other practical considerations. The program shall be made available to those employers on request.

* * *

§ 502.013. Employee Notice; Rights of Employees

(a) An employer shall post adequate notice, at locations where notices are normally posted, informing employees of their rights under this chapter. If the commissioner does not prepare the notice under Section 502.009, the employer shall prepare the notice.

(b) Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and MSDSs for the hazardous chemicals. Employees, on request, shall be provided a copy of a specific MSDS with any trade secret information deleted. In addition, employees shall receive training concerning the hazards of the chemicals and measures they can take to protect themselves from those hazards. Employees shall be provided with appropriate personal protective equipment. These rights are guaranteed.

* * *

Supreme Court, U.S.
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(2)

No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the City of Harker Heights, Texas ("the City") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Myra Jo Collins, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 2, 1990.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

Petitioner Myra Jo Collins is the widow of Larry Michael Collins. Mr. Collins, while employed by the City, died after voluntarily entering a sewer line without taking appropriate precautions. Petitioner filed suit on June 14, 1989, claiming that the City violated Mr. Collins' constitutional rights by allegedly failing to properly train Mr. Collins in certain workplace procedures. The City responded by promptly filing, on July 7, 1989, a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. After considering the briefs of each party, the District Court issued its written opinion on October 30, 1989, holding that the City had not violated a constitutionally protected right of Mr. Collins. The District Court then entered a Judgment dismissing Petitioner's Complaint. Petitioner timely filed a Notice of Appeal appealing the District Court's Judgment to the Fifth Circuit. The Fifth Circuit affirmed the District Court's decision in a published opinion.

The Fifth Circuit, following ample authority from both within and from outside the Fifth Circuit and also following and citing ample Supreme Court authority, correctly identified the controlling issue in the case and affirmed the District Court's decision. The Fifth Circuit held that Petitioner had failed to state a claim under Section 1983 since the claim alleged failed to satisfy a necessary element to a claim – the abuse of government power standard. The Fifth Circuit stated the question presented and its holding as follows:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a governmental employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. More particularly, does alleged wrongful conduct by government – in its capacity as employer rather than as a governing authority – that deprives its employee of an alleged constitutional right give rise to a Section 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> * * *
>
> Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City – one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a Section 1983 action – whether there was a deprivation of a constitutional right.
>
> * * *
>
> There was no abuse of government power. . . . Accordingly, this action cannot lie under Section 1983.
>
> The judgment of the district court is AFFIRMED.

Collins v. City of Harker Heights, Texas, 916 F.2d 284, 286, 287, 291 (1990).

Since Petitioner did not and could not properly allege or show an abuse of government power, i.e., that the City acted against the decedent as governed, the Fifth Circuit held that Petitioner had not stated a Section 1983 claim. Following the Fifth Circuit's affirmance, Petitioner sought a Writ of Certiorari from this Court.

Statement of Facts

While the City strongly disagrees with the "facts" pled by Petitioner, it is generally correct, as Petitioner asserts, that the facts pled must be assumed to be correct on a motion to dismiss. Since the Court cannot consider the City's view of the facts when ruling on the appropriateness of a motion to dismiss, the City will not attempt to color the Court's view by setting forth its version of the facts. As only the "facts" pled by Petitioner are relevant to the Court's determination at this point, the City respectfully refers the Court to the Statement of Facts contained in Petitioner's Petition for Writ of Certiorari which quotes much of Plaintiff's Original Complaint.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons for this Court to grant the Petition for Writ of Certiorari. First, Petitioner points to the split in Circuit authority on the only real issue

presented by the case, i.e., whether Petitioner must show an abuse of government power, and, second, Petitioner asserts that the Court should use this case as a vehicle to address an issue reserved in another case but which is not at issue in this case. Neither of the reasons asserted by Petitioner justify grant of the Petition for Writ of Certiorari. The two grounds advanced by Petitioner will be discussed below in turn.

First Ground – Split in Circuits

Petitioner's first basis for asking this Court to grant the Petition for Writ of Certiorari is the recent creation of a split in the Circuits on the sole issue presented by the case. The sole issue presented by the case is whether an employee of a municipality who seeks to hold the municipality liable under 42 U.S.C. Section 1983 must also plead and prove an abuse of government power, that is, that the act complained of was an act of government in its capacity as government taken against the plaintiff in his or her status as governed. Until the Eighth Circuit's recent decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), all of the Circuits which had addressed the issue had uniformly held that an employee did not have a cause of action against his government employer where all the government had done was to act as an employer and had not acted as government against one governed in such a manner as to be an abuse of government power. The Fifth Circuit has been the leader in this area, having addressed the issue three times prior to the instant case coming before it. *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444

(5th Cir. 1985). The District of Columbia, Second, and Seventh Circuits have also all addressed the issue and held that, under similar factual circumstances, the employee did not have a cause of action under Section 1983. *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 597 (1986); *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986).

The Fifth Circuit did not create the split among the Circuits about which Petitioner complains; rather, the Eighth Circuit created the split. The City submits that the Eighth Circuit's decision in *Ruge* is an aberration and that there is no need to correct the Eighth Circuit's decision.

This case would be an appropriate vehicle for correcting the *Ruge* decision if it could be argued that a lack of clarity exists in the Supreme Court's decisions which has allowed the differing interpretations reached, on the one hand, by the Fifth Circuit and the other Circuits above mentioned and, on the other hand, by the Eighth Circuit. There is, however, no such lack of clarity. Under the decisions of this Court, it is clear that an employee does not have a Section 1983 cause of action against his municipal employer unless the employee can plead and prove the requisite abuse of governmental power. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L.Ed.2d 249, 259 (1989) ("the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' ") (citing *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 88 L.Ed.2d 677, 682 (1986)); *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662,

668 (1986) (" ' "to secure the individual from the arbitrary exercise of the powers of government" ' " and "to prevent governmental power from being 'used for purposes of oppression' ") (internal citations omitted); *Parratt v. Taylor*, 451 U.S. 527, 549, 101 S.Ct. 1908, 68 L.Ed.2d 420, 438 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). As can be seen from *Washington*, *Walker*, and *McClary*, the District of Columbia, Second, and Seventh Circuits have all understood the law in this area, as clearly has the Fifth Circuit. There is no confusion in this area mandating attention by the Supreme Court. The Eighth Circuit, for reasons unknown, decided to create a cause of action which is not permitted under the decisions of this Court. Any other Circuit court which reads the decisions of this Court, and of the other Circuits which have addressed the issue, will follow the decisions of this Court and of the District of Columbia, Second, Fifth, and Seventh Circuits and not the Eighth Circuit. This Court, therefore, need not take this case merely to correct the one aberrational decision of the Eighth Circuit.

The Eighth Circuit and Petitioner herein both rely on this Court's recent decision in *City of Canton, Ohio v. Harris* for the proposition that an employee has a Section 1983 claim against his municipal employer for the employer's failure to properly train the employee. 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In fact, this Court reached exactly the opposite conclusion in *Canton*. *Canton* involved a plaintiff who, while in police custody, was allegedly denied adequate medical care due to a failure to properly train police officers. *Canton* does not hold that an employee who is injured due to a failure

to properly train may state a Section 1983 cause of action. The specific language of *Canton* states that it applies only when the failure to train injures a non-employee of the governmental entity: "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability *only* where the failure to train amounts to deliberate ~~indifference~~ *to the rights of persons with whom the police come into contact.*" 103 L.Ed.2d at 426 (emphasis added). *Canton* therefore applies only to injuries to third parties and not to injuries to governmental employees. Accordingly, *Canton* does not in any manner stand for the proposition for which Petitioner and the Eighth Circuit contend that it does.

In an effort to bolster her argument concerning a split among the Circuits, Petitioner argues that there are several Circuits, at least by implication, on the other side of the issue from the Fifth Circuit. This is simply not correct. *Ruge* is the only decision in conflict with the other Circuits. Petitioner argues that the instant decision conflicts with those of the Second Circuit in *McClary*, the Eleventh Circuit in *Cornelius*, and the Third Circuit in *Stoneking*. *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990). As discussed below, these decisions are not in conflict with the Fifth Circuit's decision.

The *McClary* court reached the same result and used the same analysis as the Fifth Circuit. In *McClary*, the plaintiff's deceased husband worked for the county highway department. While in the course of his employment,

the plaintiff's husband was struck by the boom of a crane and died. The plaintiff brought suit against the county, among others, under 42 U.S.C. Section 1983. The plaintiff alleged that the county violated state safety laws by failing to properly inspect and maintain the crane and by allowing the operator to operate the crane without a required certificate of competency. The plaintiff further alleged that the conduct of the defendants was reckless and that the county had an established policy of disobeying state and federal safety regulations. The district court dismissed the plaintiff's complaint for failure to state a claim and the court of appeals affirmed. In affirming the dismissal, the court of appeals noted that "the only fact distinguishing this case from an ordinary tort action brought by an employee against an employer is the identity of that employer" and that the Constitution "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." 786 F.2d at 89. As can be seen from the foregoing discussion of *McClary*, there is no conflict between the *McClary* holding and the holding in the instant case. To the contrary, the holding in *McClary* is consistent with the holding of the Fifth Circuit in the case at bar.

Petitioner next argues that the Fifth Circuit's decision in this case conflicts with the Eleventh Circuit's decision in *Cornelius*. In *Cornelius*, the plaintiff, the clerk of the defendant town, brought suit against the town and others after she was abducted by state prison inmates assigned to a community work squad. The district court granted a summary judgment in the defendants' favor after finding that the plaintiff failed to present a genuine issue of

material fact regarding whether the defendants owed her a duty to protect her from the criminal actions of work squad inmates in the Alabama correctional system. The Eleventh Circuit reversed the summary judgment because the Eleventh Circuit found that the plaintiff had presented a genuine issue as to whether a special relationship existed between the defendants and the plaintiff and whether the defendants were aware that she faced special danger from the work squad inmates. If such a special relationship existed or if the defendants were aware of a special danger, then the plaintiff had a Section 1983 claim for failure to provide adequate protection. The Eleventh Circuit did not hold that only municipal employees could bring Section 1983 claims against their employers when a special relationship or special danger existed and adequate protection was not provided. While the fact that the town clerk worked for the defendant town was a factor in whether a special relationship or special danger existed in *Cornelius*, a private citizen would have the same cause of action if a special relationship or special danger existed. For example, a citizen who entered the town hall for a meeting and who was injured by one of the work squad inmates should have the same Section 1983 claim against the town. Thus, *Cornelius* did not create a cause of action which is available only to municipal employees and which exists only by reason of the employment relationship.

The holding of the Eleventh Circuit in *Cornelius* does not conflict with the Fifth Circuit's holding in the instant case. *Cornelius* did not involve, as does the case at bar, a suit by an employee against a municipal employer for injuries received by the employee in the normal course of

employment. The government was not held subject to Section 1983 liability in *Cornelius* because it was an employer, or for its action as an employer, but rather because it misused its power as government in the management of prison inmates. In *Cornelius* it was clear that an abuse of governmental power was involved and this was not at issue in the case. The government was acting in its unique capacity as government when it exposed the public to inmates by using the inmates on work squads. Custody of prisoners is a function and power of government. Government officials, because of their capacity as government officials, were able to impose a loss on the plaintiff, and there was a misuse of power made possible only because the government was clothed with authority of State law.

Cornelius merely reiterated the Eleventh Circuit's earlier holding that a citizen has a Section 1983 claim when a governmental defendant fails to provide adequate protection and the governmental defendant has a special relationship with the plaintiff or the governmental defendant is aware of a special danger to the plaintiff. The Fifth Circuit in this case has merely held that a governmental employee cannot recover from a governmental employer where all the government did was act as an employer and no abuse of governmental power is involved. The Fifth Circuit did not hold in this case that a governmental employee who can allege an abuse of governmental power, as did the plaintiff in *Cornelius*, does not have a Section 1983 claim against the governmental entity. The Eleventh Circuit's holding in *Cornelius* is thus not in conflict with the Fifth Circuit's holding in this case.

Petitioner also claims that the Fifth Circuit's holding is in conflict with the Third Circuit's holding in *Stoneking*. Petitioner is again incorrect. *Stoneking* involved a suit against a school district and school officials arising out of sexual assaults on a student by a schoolteacher. The Third Circuit held that the student could bring such a claim against the defendants if the student could prove a policy, practice, or custom which directly caused her constitutional harm. This holding is not in conflict with the Fifth Circuit's holding in this case. *Stoneking* did not involve a government employee as plaintiff and did involve an abuse of government power. The Plaintiff was a public school student and was, in that sense, in the custody of the school system and school officials when the alleged misconduct occurred. The teacher, the school district, and the school officials were able to impose a loss on the student because a government was acting in its capacity as government. Further, the misuse of power was made possible only because the school district was clothed with authority of State law. Therefore, use of governmental power was not an issue in *Stoneking*, and there is no conflict between this case and *Stoneking*.

All of the cases cited by Petitioner as being in conflict with the Fifth Circuit's opinion in this case, with the exception of *Ruge*, are not in conflict with this case and instead fit within the framework of Section 1983 liability. To establish Section 1983 liability, a plaintiff must, in addition to showing a constitutional deprivation, show either: (1) that the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders the individual unable to care for himself, or (2) that a governmental official, because of his unique position as

such, was able to impose a loss on an individual, or (3) that there was a misuse of power made possible only because the governmental entity was clothed with authority of state law. *Collins*, 916 F.2d at 291 (citing *DeShaney*, 109 S.Ct. at 1005, 103 L.Ed. at 261-62; *McClary*, 786 F.2d at 89; and *Rankin*, 762 F.2d at 449). In *Stoneking* and *Cornelius*, the plaintiffs were able to properly allege that a government official, because of his unique position, was able to impose a loss or that there was a misuse of power made possible only because the entity was clothed with authority of state law. However, Petitioner herein is unable to allege any one of the three aforementioned requisites for meeting the use of governmental power standard or element, a requirement for imposing Section 1983 liability.

The City freely admits that there is a conflict between the Fifth Circuit's holding in this case and the Eighth Circuit's holding in *Ruge*. *Ruge*, however, stands alone as an isolated misinterpretation of this Court's holding in *Canton*. We have found no other cases which adopt the *Ruge* analysis. This Court need not and should not grant the Petition for Writ of Certiorari simply to correct the one-time mistake found in *Ruge*.

Second Ground – Alleged Right to a Safe Workplace

Petitioner's second basis for urging the Court to grant the Petition for Writ of Certiorari is the contention that this Court should take the case in order to resolve the reach of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Petitioner further argues that the Texas Hazard

Communication Act creates a substantive due process right to a safe workplace.

Petitioner is, in effect, asking this Court to grant the Petition for Writ of Certiorari in order to decide an issue that is not of importance to the case. For Petitioner to have a Section 1983 claim against the City, Petitioner must prove an abuse of government power. Without an abuse of government power, the secondary issue of whether there is a constitutional right to a safe workplace is moot. This Court should not take this case in order to issue an advisory opinion as to whether there is a constitutional right to a safe workplace.

Furthermore, the Court need not take the case to state what all of the courts to have addressed the issue other than the Eighth Circuit seem to understand. There is no constitutional right to a safe workplace. *Washington*, 802 F.2d at 1481 ("We have found no cases holding that an employee's right to a safe workplace is secured by anything other than the state law of tort"); *Walker*, 791 F.2d at 510-11 ("We therefore hold that the due process clause does not assure safe working conditions for public employees."); *McClary*, 786 F.2d at 88-89; *Rankin*, 762 F.2d at 448. To create such a right would give government employees a substantive due process right which private employees do not have and would vastly increase tort claims, clothed as constitutional claims, against municipalities and other governmental entities.

As this Court stated in *Daniels v. Williams*, the Constitution does not exist to supplement traditional tort law:

> Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states," *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct 1908, 1917, 68 L.Ed.2d 420].

474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 669 (1986). Petitioner has whatever remedies she might have under traditional tort law; she does not, however, have a Section 1983 claim against the City.

CONCLUSION

Petitioner's argument, if adopted, would convert Section 1983 into an ordinary tort statute. Petitioner would have a government entity held liable to a government employee whenever a certain standard of fault is met, regardless of whether there is an abuse of government power. This Court has repeatedly stated that it will not so convert Section 1983. The Fifth Circuit correctly understood the clear position of this Court on that subject when it wrote in *Rankin*: "[T]o predicate liability under Section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that Section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of State law." 762 F.2d at 447-48. The District of Columbia, Second

and Seventh Circuits have also had no difficulty understanding Supreme Court authority on the issue presented by this case. This Court need not take this case to reiterate its position that it will not convert Section 1983 into an ordinary tort statute.

For all of the foregoing reasons, Respondent, the City of Harker Heights, Texas, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

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OCTOBER TERM, 1990

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VS.

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Respondent.

REPLY BRIEF

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OCTOBER TERM, 1990

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Petitioner,

VS.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

REPLY BRIEF

INTRODUCTION

Like ships passing in the night, Respondent's Brief in Opposition and the Petition for Writ of Certiorari do not meet. They barely glide past one another, glancing against one another at a single point. Just as the Fifth Circuit did below (916 F.2d at 290-91; id. at 291, n. 10, Appendix at A13), Respondent "freely admits that *there is a conflict* between the Fifth Circuit's holding in this case and the Eighth Circuit's holding in *Ruge" v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). Brief in Opposition at 13 (emphasis added); *id.* at 5-8. That conflict could not be more direct; yet Respondent seeks to minimize it by improperly characterizing the Eighth Circuit's decision as aberrational. Brief in Opposition at 6. To do this Respondent strains, without success, to explain away other more subtle conflicts between the Fifth Circuit's approach to claims under 42 U.S.C. Section 1983 brought against municipalities by their employees, and the approaches of other Circuits, including the Second, Third and Eleventh. Respondent also ignores the fact that none of the Circuit Court decisions relied upon by it or the Fifth Circuit

below, except for one other Fifth Circuit decision, was rendered after this Court's seminal decisions in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) and *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). By contrast Petitioner relies on post *Harris* and *De Shaney* decisions in the Third, Tenth and Eleventh Circuits in addition to the directly in-point Eighth Circuit decision in *Ruge*.

In this Reply Brief, Petitioner seeks to refocus the briefing on the actual issues and considerations that make this case suitable for the Court's plenary review.

REASONS FOR GRANTING THE WRIT

I

There Is A Direct Conflict In The Circuits On The Questions Presented, Which Should Be Resolved By This Court.

The conflict among the Circuits is much more pervasive and profound than Respondent contends. *Compare* Petition at 5-10 *with* Brief in Opposition at 5-13. Although admitting the direct conflict between the Eighth Circuit in *Ruge* and the Fifth Circuit below, Respondent obfuscates other more subtle conflicts.

To elucidate these conflicts, it is necessary to parse the Fifth Circuit's analysis of the issues in this case, which involves some explanation of the Fifth Circuit's error.

Respondent tries to eliminate all other conflicts among the Circuits by exalting the Fifth Circuit's approach to the first issue in the case, which Petitioner has stated as follows:

> 1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, when it alleges that the decedent's death resulted from the municipality's policy or custom of "deliberate indifference" to decedent's constitutionally protected rights under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, where the Estate alleges both (1) the municipality's deliberately indifferent policy or custom of failing to train, equip or supervise employees, and

> (2) a direct causal link between that municipal policy or custom and the constitutional deprivation?
>
> Petition at i.

Both the Fifth Circuit and Respondent attempt to recast and beg that question as follows:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a government employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a Section 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> 916 F.2d at 286, Appendix at A3; Brief in Opposition at 3.

Having thus reformulated the question, the Fifth Circuit and the Respondent then beg the question by simply declaring, without serious analysis, that "there is no abuse of power. . . . Accordingly this action cannot lie under Section 1983." 916 F.2d at 291, Appendix at A13; Brief in Opposition at 3. The Fifth Circuit decided that although adequately pleaded, "abuse of governmental power . . . cannot be present under any allegation in this action." 916 F.2d at 290 n.7, Appendix at A11 n.7.

The Fifth Circuit reaches this result essentially through repeated recapitulation of the conclusion that Petitioner

> ". . . made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law."

916 F.2d at 288, Appendix at A9, quoting *Rankin v. City of Wichita Falls*, 762 F.2d 644, 447, 449 (5th Cir. 1985) (emphasis in original). See Brief in Opposition at 6-7.

No guidance is given as to how a first amendment, equal protection, property or procedural due process claim by a municipal employee differs from the claims of deprivation of life, liberty or substantive due process claims presented in this case. Surely a first amendment, equal protection, property or procedural due process claim against a municipal employer often also involves "the abuse of power of which any private employer might be guilty." The only reason any of these claims can be stated under Section 1983 is that each involves a claimed deprivation of a federally protected constitutional right which the government must respect, regardless of the capacity in which it acts. The same can be true of a claim based upon deprivation of life, liberty or substantive due process.

The governmental versus proprietary dichotomy adopted by the Fifth Circuit is simply wrong. In assessing a Section 1983 claim the relevant inquiry is whether plaintiff asserts a federally protected right, not the capacity in which the municipality acted. Abuse of government power flows from the existence of the constitutional or federally protected right.

As the *Ruge* Court held in light of this Court's decision in *Harris*, any "abuse of governmental power" requirement merges into the causation and federally protected rights elements of the Section 1983 claim:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action.
>
> 892 F2d at 741.
>
> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n. 6.

Thus, in the Section 1983 setting, in considering a Rule 12(b) F.R.CivP motion, municipal liability turns only on whether the following elements have been well pled:

1. A tortious act
2. performed under color of state law
3. that has caused an injury
4. through deliberate indifference of the municipality
5. that causes deprivation of a federally protected right.

The Fifth Circuit's inability or unwillingness to accept this analysis sets it apart not only from the Eighth Circuit but also from the Second Circuit in *McClary v. O'Hare*, 789 F.2d 83 (2nd Cir. 1986). See Ruge, 892 F.2d at 741 (so analyzing the *McClary* decision).

Moreover, despite Respondent's sophistic efforts to explain otherwise (Brief in Opposition at 8, 9-13), the Fifth Circuit's decision also is at odds with the post *Harris and De Shaney* decision of the Eleventh Circuit in *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 108 L.Ed.2d 785 (1990).

Cornelius specifically recognized that a claim may be asserted under Section 1983 against a municipality by one of its employees for personal injuries arising in the course of her employment. Notably, the Eleventh Circuit specifically held that the municipality owed its employee a federally cognizable duty of care arising directly from her employment relationship.

> . . . if Mrs. Cornelius wished to continue serving as the town clerk, she had to work in the environment created by the town officials; one that included routine exposure to prison inmates around the town hall. As Town Clerk, Mrs. Cornelius was required to submit to these conditions by her superiors, conditions well beyond the normal restrictive control inherent in an employer-employee relationship to which an employee agrees.
>
> 880 F.2d at 355.

Similarly, if the decedent herein wished to continue serving as a City sewer worker, "which involved conditions well beyond the normal restrictive control inherent in an employer-employee relationship to which an employee agrees," he had to work in the environment, created by city officials, that included routine unprotected exposure to poisonous sewer gas, due to his employer's deliberate indifference. Further, it is uncontested that under Texas law sewer work is exclusively a governmental function. *Compare* Petition at 5 (citing Texas Civil Practice and Remedies Code, Section 101.0215 (Vernon 1990)) *with* Brief in Opposition (which does not contest the point).

Finally, Respondent ignores entirely the implicit conflict in the Circuits, between the Fifth Circuit in the instant case, and the Third Circuit in *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied,* 107 L.Ed.2d 835 (1990). Stoneking's interpretation of this Court's decision in *De Shaney,* focuses on the difference between tortious acts performed directly by state actors against Section 1983 plaintiffs and those in which private actors intervene, as in *De Shaney*. This distinction renders a number of the cas[illegible]d upon by the Respondent and the Fifth Circuit in the ins[illegible]ase, inapposite. With the exception of the instant case and [illegible]cond Circuit's decision in *McClary,* each of the other Circuit Court decisions relied upon by Respondent and the Fifth Circuit herein involved "intervening efficient" non-state action causes of plaintiffs' injuries. *Compare* Petition at 8-9 with 916 F.2d at 287-290, Appendix at A7-A11; Brief in Opposition at 5-6.

Suffice it to say there are both direct and indirect but profound and important conflicts among the Circuits presented by the Petition in the instant case that should call in play this Court's plenary review. See also *Ware v. Unified School District No. 492,* 902 F.2d 815 (10th Cir. 1990) (applying *Harris* to a wrongful termination claim in a public school setting).

II

This Case Raises Important Recurring Questions Of Federal Constitutional Law That Are Unresolved And That Should Be Resolved By This Court.

Respondent somehow misconceives Petitioner's second question presented and exploits its misconception as a basis for arguing that nothing of importance has been submitted to this Court for plenary review. *Compare* Petition at i with Brief in Opposition at 13-15. The error pertains to Petitioner's first question presented as well.

The questions in this case are *not,* as Respondent argues, whether there is a constitutional right to a safe workplace as that concept has evolved under common law tort and statutory workers compensation law. The questions are *(1)* whether a municipal employer's *deliberate indifference* to the health and safety of its employees can rise to the level of deprivation of a federally protected life, liberty or substantive due process right and *(2)* whether a state statute that requires all Texas employers (including municipalities) to inform and train their employees concerning workplace safety and to provide appropriate personal protective equipment, creates a substantive due process liberty interest or "entitlement" to be free from the very workplace hazards to which the Estate's decedent succumbed. Petition at i.

Both questions are obviously very important. Further, as to the first question, there is a clear conflict between the Fifth and Eighth Circuits, as well as other conflicts among the Circuits. Given these conflicts, Respondent cannot seriously contend that the issue has been resolved by this Court.

Nor does Respondent even try to suggest that the second question has been resolved by this Court, given the Court's specific reservation of the question in *De Shaney,* 489 U.S. at 2.

The Fifth Circuit avoided this question only by begging the question of "abuse of governmental power," and then simply refused to address the question. 916 F.2d at 287 n.3, Appendix at A6-A7 n.3. Such a question begging approach is wrong.

Nor is such question begging necessary to avoid converting Section 1983 into a common law tort statute. Careful attention to the federally protected right, causation and deliberate indifference elements of the Section 1983 claim are more than adequate protection against federalizing tort law. *Cf. Daniels v. Williams,* 474 U.S. 327, 335 (1986).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 28, 1991

Respectfully submitted,

Sanford Jay Rosen
Attorney of Record

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

JOINT APPENDIX

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Petition For Writ Of Certiorari Docketed
February 4, 1991; Petition Granted April 15, 1991

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CLOSED

U.S. District Court
Western District of Texas (Waco)

CIVIL DOCKET FOR CASE #: 89-CV-168

Collins v. City of Harker Hts.
Assigned to: Judge Walter S. Smith
Demand: $0,000
Lead Docket: None
Dkt # : is none
Dkt# in USCA is 89-8029

Cause: 42:1983 Civil Rights Act

Filed: 6/14/89
Jury demand: Plaintiff
Nature of Suit: 440
Jurisdiction: Federal Question

MYRA JO COLLINS plaintiff	Donald Lee Busby [COR LD NTC] Busby & Associates, P.C. 2109 Bird Creek Terrace Temple, TX 76502 (817) 778-4855
v.	
THE CITY OF HARKER HEIGHTS, TEXAS defendant	Roy Lee Barrett [COR LD NTC] Naman, Howell, Smith Et Al P.O. Box 1470 Waco, TX 76703-1470 817/754-1421
	Stuart G. Smith [COR LD NTC] Naman, Howell, Smith & Lee P.O. Box 1470 Waco, TX 76703

Docket as of May 6, 1991 9:38 am

Proceedings include all events. 6:89cv168 Collins v. City of Harker Hts.

6/14/89	1	Complaint filed and 1 summons(es) issued (bh) [Entry date 06/19/89]
6/22/89	2	Return of service executed as to City of Harker Hts. 6/20/89 (bh)
7/7/89	3	Motion by City of Harker Hts. To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted (bh)
7/7/89	4	Brief by City of Harker Hts. in support of Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
8/24/89	5	Response by Myra Jo Collins To Defendant's Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
8/31/89	6	Reply by City of Harker Hts. To Response To Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
10/30/89	7	Order Granting Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
10/31/89	8	Judgment: Defendant's motion to dismiss is granted (bh)
10/31/89	–	Case dismissed (bh)
10/31/89	9	Supplemental Brief by Myra Jo Collins in Opposition To Motion To Dismiss Plaintiff's Original Complaint For Failure To State A Claim Upon Which Relief Can Be Granted [3-1] (bh)
11/16/89	10	Notice of appeal by Myra Jo Collins (csw) [Entry date 11/17/89]
11/16/89	11	Certificate that No Transcript is to be Ordered. (csw) [Entry date 11/17/89]

11/16/89	12	Motion by Myra Jo Collins to Waive Requirement of Cost Bond on Appeal (csw) [Entry date 11/17/89]
11/17/89	–	Notice of appeal and certified copy of docket to USCA: appeal [10-1] (csw)
11/21/89	13	Order Denying as Moot Motion To Waive Requirement of Cost Bond on Appeal [12-1] (csw) [Entry date 11/22/89]
11/24/89	–	Return of appeal information sheet received. appeal [10-1] USCA NUMBER: 89-8029 (csw)
11/24/89	–	Certified and transmitted record on appeal to U.S. Court of Appeals: appeal [10-1] (csw)
12/4/89	–	Return of appeal information sheet received. appeal [10-1] USCA NUMBER: 89-8029 (csw) [Entry date 12/06/89]
11/28/90	14	Certified copy of judgment of USCA affirming appeal [10-1] (pr)
12/10/90	–	Record on Appeal returned from Fifth Circuit (pr)
4/25/91	–	Certified and transmitted record to the United States Supreme Court per written instructions from Fifth Circuit. Supreme Court case number 90-1279. Writ of Certiorari granted. (pr)
4/26/91	15	Order that the Clerk include a "copy" of the file-marked Certificate That No Transcript Is To Be Ordered with the original record being sent to the Supreme Court. (pr) [Entry date 04/29/91]

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION
	X	NO W 89CA168
VS.	X	
	X	JURY TRIAL
THE CITY OF HARKER	X	DEMANDED
HEIGHTS, TEXAS	X	

ORIGINAL COMPLAINT

The Plaintiff MYRA JO COLLINS files this her Original Complaint against THE CITY OF HARKER HEIGHTS, TEXAS.

Nature of Action, Jurisdiction and Venue

1. This is an action instituted under the Constitution and Laws of the United States of America, more particularly, the Fifth and Fourteenth Amendments to the United States Constitution and the Reconstruction Era Civil Rights Act as codified in 42 U.S.C. 1983, 1985(2) and 1988.

Plaintiff also asserts claims under Article I Sec. 19 of the Constitution of the State of Texas and the common law thereof.

The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1331 and 1343.

The venue of this cause of action lies in Bell County, Texas, pursuant to the death of Larry Michael Collins, the deceased husband of Plaintiff, his death being the subject matter of this lawsuit, having occurred in Bell County, Texas.

Right to Sue in Federal Court

The cause of action arises out of the Federal Law 42 U.S.C. 1983 and, therefore, the cause of action may proceed in Federal Court.

Defendant

Defendant, THE CITY OF HARKER HEIGHTS, TEXAS, is a Texas Municipal Corporation, located in Bell County, Texas and service may be obtained by serving a summons on the City Manager, Hal Weiler, at 901 South Ann, Harker Heights, Texas.

Federal Cause of Action 42 U.S.C. 1983

1. Larry Michael Collins was an employee for the City of Harker Heights, Texas in their Sanitation & Sewer Department.

2. The City of Harker Heights is a Home Rule City and is a Texas Municipal Corporation.

3. Larry Michael Collins began working for the City of Harker Heights about July 1, 1988.

4. Part of the job responsibilities of Larry Michael Collins was to enter sewer mains through manholes when there was a sewer line problem.

5. The City of Harker Heights provided no safety training to Larry Michael Collins but required him to work in sewer lines as a part of his job.

6. There were no safety warnings or signs posted to inform Larry Michael Collins of the danger of entering a sewer line.

7. There were no instructions, literature or signs concerning how one should protect themselves before entering sewer lines and other confined spaces.

8. The City of Harker Heights owned air blowers and safety ropes, but the supervisors were not instructed or required to use them, therefore, whey [sic] were rarely used, nor were the employees instructed on how or why to use them.

9. No gas detector meters were available at the City of Harker Heights for employees entering sewer lines.

10. The City of Harker Heights through its supervisors were aware of the dangers of gases accumulating in sewer lines and were aware of the dangers of such gases.

11. On October 21, 1988, Larry Michael Collins entered a manhole in the City of Harker Heights to try and unstop a sewer line.

12. Larry Michael Collins entered the manhole (approximately 18 feet in depth) without any safety equipment, without a harness, respirator, air blower, or gas detector meter.

13. Upon entering the manhole Larry Michael Collins passed out and before he could be removed, died of asphyxia due to suffocation (oxygen deprivation).

14. Effective January 1, 1986, the State of Texas implemented a law entitled "Hazard Communication Act", the purpose of which was stated in part as follows:

> "It is also the intent and purpose of this Act that the information be provided to employees who may be exposed to hazardous chemicals in nonmanufacturing workplaces . . . "

15. The Act further defines "employee" as follows:

> "The term 'employee' includes persons working for the State of Texas and its political subdivisions, . . . "

16. "Nonmanufacturing" employer means "The State of Texas and its political subdivisions".

17. The Hazardous Communication Act requires "Employers *shall* post adequate notice, at locations where notices are normally posted, informing employees about their rights under this Act".

18. The Act further requires the employer to provide training to new or newly assigned employees before working with or in a work area containing hazardous chemicals.

19. Furthermore, the Act provides:

> " . . . employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act."

Constitutional Violations

1. Prior to October, 1988, the custom, policy and procedure of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a custom to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.

2. Prior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, the Hazardous Communication Act became effective January, 1986, which imposed a burden on the City of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a custom and policy to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.

5. The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas Hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights – the right to be free from harm and injury resulting in death.

State Constitutional Rights

Plaintiff would show the Court that not only were the Federal Constitutional rights of Larry Michael Collins violated, but his State Constitutional rights were violated as well. Article 1, Section 19 of the Texas Constitution states as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land".

Casual Connection

The City of Harker Heights' policy and procedure not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their policy and procedure to not train employees in the use of proper safety equipment required by the State law and policy and custom not to require the safety equipment to be on hand or used at the job site were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.

Claim for Relief

1. Actual damages for loss of wages;
2. Mental anguish of Larry Michael Collins;
3. Termination of the love, comfort, companionship and society;
4. Loss of care, maintenance, support, services, advice and counsel;
5. Mental anguish of Plaintiff and funeral and burial expenses;
6. All of the above damages exceed One Million and No/100 Dollars ($1,000,000.00).

Prayer

Upon the foregoing premises, Plaintiff prays that Defendant be served with process and upon final hearing be required to pay to Plaintiff her damages in an amount that the

evidence may show and the jury may find and such other relief as the Court shall deem the Plaintiff has shown herself entitled.

Respectfully submitted,

Busby & Associates, P.C.
2109 Bird Creek Terrace
Temple, Texas 76502
(817)-778-4855

By: /s/ Don Busby
DON BUSBY
State Bar #03490000

ATTORNEYS FOR PLAINTIFF

JURY TRIAL DEMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") files this its Motion To Dismiss Plaintiff's Original Complaint For Failure to State a Claim Upon Which Relief Can Be Granted and would show unto the Court as follows:

1.

As further set forth in the Brief accompanying this Motion, defendant moves the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the action because the Complaint fails to state a claim against defendant upon which relief can be granted.

Attached to this Motion is the affidavit of Michael Bratcher in support of the Motion.

WHEREFORE, defendant The City of Harker Heights, Texas prays that the court dismiss Plaintiff's Original Complaint for failure to state a claim upon which relief can be

granted and for such other and further relief as to which defendant may justly be entitled.

Respectfully submitted,

/s/ Stuart Smith
Roy L. Barrett
State Bar No. 01814000
Stuart Smith
State Bar No. 18685885
of
NAMAN, HOWELL, SMITH
& LEE, P.C.
Texas Center
P.O. Box 1470
Waco, Texas 76703-1470
817/754-1421

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Defendant's Motion To Dismiss Plaintiff's Original Complaint For Failure To State a Claim Upon which Relief May Be Granted was mailed by certified mail, return receipt requested, to plaintiff's attorney of record, Don Busby, Busby & Associates, P. C., 2109 Bird Creek Terrace, Temple, Texas 76502 on this 7th day of July, 1989.

/s/ Stuart Smith
Stuart Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

AFFIDAVIT

ON THIS DAY before me, the undersigned, personally appeared Michael Bratcher, known to me to be the person whose name is subscribed hereto and under oath stated as follows, and, being duly sworn by me, stated on his oath as follows:

"My name is Michael Bratcher. I am over the age of 18 years, have never been convicted of a felony, and am of sound mind. I have personal knowledge of every statement made herein, and I am fully competent to testify as to the matters stated herein.

"I am a Claims Supervisor for GAB Business Services. "[sic] GAB Business Services is the servicing contractor for the Texas Municipal League Joint Workers' Compensation Self-Insurance Fund.

"On October 21, 1988, pursuant to Article 8309h, Texas Revised Civil Statutes, the City of Harker Heights, Texas was a participant in and a member of the Texas Municipal League Joint Workers' Compensation Self-Insurance Fund.

"Myra Jo Collins, the wife of Larry Michael Collins, made a claim for workers' compensation benefits for the injuries and death of her husband on October 21, 1988. The claim was assigned Industrial Accident Board File No. 89012396C2.

"Myra Jo Collins is currently receiving workers' compensation benefits from the Texas

Municipal League Joint Workers' Compensation Self-Insurance Fund."

/s/ Michael Bratcher
Michael Bratcher

STATE OF TEXAS	)
COUNTY OF TRAVIS	)
	)

BEFORE ME, the undersigned authority, on this day personally appeared Michael Bratcher, known to me to be a credible person, who, being duly sworn stated on his oath that he has read the foregoing Affidavit and that all facts contained therein are true and correct to his own personal knowledge.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 6th day of July, 1989.

/s/ Cynthia L. Ortiz
Notary Public in and for
the State of Texas

CYNTHIA L. ORTIZ
Printed Name of Notary

My commission expires: 2/2/93

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	
V.	)	CIVIL ACTION NO. W-89-CA-168
THE CITY OF HARKER HEIGHTS, TEXAS	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") submits this Brief In Support Of Motion To Dismiss Plaintiff's Complaint For Failure To State A Claim Upon Which Relief Can Be Granted and would show unto the Court as follows:

1.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Myra Jo Collins ("plaintiff") is the widow of Larry Michael Collins, a former employee of defendant. Larry Michael Collins died on October 21, 1988, while in the course and scope of his employment as an employee of defendant. Defendant is a participant in a workers' compensation self-insurance plan which is the statutory equivalent of having workers' compensation insurance coverage. *See* TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon Supp. 1989). Plaintiff filed for and is receiving benefits from the self-insurance plan.

On June 14, 1989, plaintiff, pursuant to 42 U.S.C. §1983, filed this suit against defendant alleging that defendant violated her husband's federal constitutional rights under the Fifth and Fourteenth Amendments. Plaintiff also alleged violations of the Constitution of the State of Texas. Defendant was served on June 20, 1989. Plaintiff prayed for damages

which are claimed to exceed one million dollars. Contemporaneously with this Brief, defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

2.

ARGUMENT AND AUTHORITIES

Based on the facts alleged by plaintiff, there is no legal theory on which plaintiff may hold defendant liable. Plaintiff, evidently realizing that workers' compensation immunity protects defendant from negligence and wrongful death claims and that the Texas Tort Claims Act protects defendant from exemplary damages claims, has attempted to convert her negligence and wrongful death claims into federal and state constitutional claims. While plaintiff's attempt to evade the clear intent of the workers' compensation laws and Texas Tort Claims Act is admittedly creative, the case law establishes that her attempt must nevertheless fail.

A.

Workers' Compensation Immunity

The workers' compensation laws provide absolute immunity from any negligence or wrongful death claims which plaintiff might bring. Section 101.028 of the Texas Civil Practice & Remedies Code provides as follows:

> A governmental unit that has workers' compensation insurance or that accepts the workers' compensation laws of this state is entitled to the privileges and immunities granted by the workers' compensation laws of this state to private individuals and corporations.

It is undisputed that defendant has accepted the workers' compensation laws of Texas and that plaintiff has elected to receive workers' compensation benefits. Defendant is therefore entitled to the immunities granted by the Texas workers' compensation laws. The workers' compensation laws prohibit

actions against an employer for damages resulting from the employee's death based on negligence.

> [T]he representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employees for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for.

TEX. REV. CIV. STAT. ANN. art. 8306 §3(a) (Vernon Supp. 1988). Defendant has workers' compensation immunity from any negligence or wrongful death claim which plaintiff could assert.

B.

Immunity From Exemplary Damages

The Texas Tort Claims Act provides absolute immunity from any exemplary damages claim which the plaintiff might bring. Article 8306 §5 of the workers' compensation laws would ordinarily permit a deceased worker's survivors to bring an exemplary damages claim against his employer for gross negligence.

> Nothing in this law shall be taken or held to prohibit the recovery of exemplary damages by the surviving husband, wife, heirs of his or her body, or such of them as there may be of any deceased employe [sic] whose death is occasioned by homicide from the wilfil [sic] act or omission or gross negligence of any person, firm or corporation from the employer of such employe [sic] at the time of the injury causing the death of the latter.

TEX. REV. CIV. STAT. ANN. art. 8306 §5 (Vernon 1967). However, the Tort Claims Act prohibits claims against governmental entities such as the City of Harker Heights for exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. §101.024 (Vernon 1986); *see also Duhart v. State*, 610 S.W.2d 740 (Tex. 1980) (there is no waiver of governmental immunity in a suit brought by survivors of deceased state employee

against the state for exemplary damages under allegation that state's gross negligence caused employee's death).

C.

No Constitutional Violation is Stated

Obviously realizing that she cannot bring ordinary or gross negligence claims against defendant, plaintiff has attempted to characterize her tort claim as a constitutional claim against defendant. Plaintiff's attempt, however, is directly contrary to established case law. The courts have repeatedly held that an employee or his representative may not turn an ordinary negligence or wrongful death claim into a constitutional claim simply because the employee happens to work for a governmental entity. A case directly on point is *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986). In *McClary*, the plaintiff's deceased husband worked for the county highway department. While in the course of his employment, the plaintiff's husband was struck by the boom of a crane and died. The plaintiff brought suit against the county, among others, under 42 U.S.C. §1983. The plaintiff alleged that the county violated state safety laws by failing to properly inspect and maintain the crane and by allowing the crane operator to operate the crane without a required certificate of competency. The plaintiff further alleged that the conduct of the defendants was reckless and that the county had an established policy of disobeying state and federal safety regulations.

The district court dismissed the plaintiff's complaint for failure to state a claim and the court of appeals affirmed. In affirming the dismissal, the court of appeals noted that "the only fact distinguishing this case from an ordinary tort action brought by an employee against an employer is the identity of that employer" and that the constitution "does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." 786 F.2d at 89. The facts of *McClary* are strikingly similar to the present case and the reasoning is

directly applicable. This Court should therefore dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

In at least two other cases, both involving prison guards attacked by inmates, the federal courts of appeals have held that there is no constitutional right to a safe work place. *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S. Ct. 597, 93 L.Ed.2d 597 (1986). In *Walker* the appellate court assumed for the purposes of its decision that the defendants were grossly negligent and that they knew that their acts and omissions increased the risk of injury to the plaintiffs. The court then held that "[t]he constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment" and that "the due process clause does not assure safe working conditions for public employees." *Walker*, 791 F.2d at 507.

The Court in *Washington* affirmed the district court's dismissal of plaintiff's complaint for failure to state a claim. The plaintiff had alleged that the defendants were grossly negligent and reckless and that they were in violation of a court order to correct unsafe conditions at the prison. The court rejected the plaintiff's attempt to federalize his state tort law claims and held that the plaintiff has no constitutional right to a safe working environment.

The same reasoning applicable to plaintiff's federal constitutional claims should also be applied to dismiss plaintiff's state constitutional claims. Although there appears to be no case law holding that the state constitution does not permit workers to turn ordinary tort claims into constitutional claims, there is likewise no case law for the proposition that such a transformation is permitted. The Texas courts have held that article I, §19 of the Texas constitution protects the same substantive due process rights as does the federal Constitution. *See* Interpretative Commentary to TEX. CONST. art. I, §19. As there is no federal constitutional right to a safe working environment, there is likewise no state constitutional right to a safe working environment. To create such a cause of

action would allow governmental employees to have greater rights than do employees of private employers. Plaintiff's state constitutional claims should be analyzed and treated in the same manner as her federal constitutional claims.

Based on the case law discussed above, this Court should dismiss plaintiff's federal constitutional claims.

Respectfully submitted,

/s/ Stuart Smith
Roy L. Barrett
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Stuart Smith
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION NO.
VS.	X	W-89-CA-168
	X	FILED
THE CITY OF HARKER HEIGHTS, TEXAS	X	AUG 24 1989
	X	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiff, MYRA JO COLLINS, and submits this response to the Defendant's Motion To Dismiss Plaintiff's Complaint, and would respectively show unto the Court as follows:

1. In its Motion To Dismiss, THE CITY OF HARKER HEIGHTS, TEXAS (hereinafter sometimes "HEIGHTS") has alleged that Mrs. Collins failed to state a cause of action on which relief can be granted. For purposes of evaluating the Motion filed by HEIGHTS, this Court is required to assume the facts pleaded by Mrs. Collins in her original complaint are true and correct. Only if no relief can be provided to Mrs. Collins based on the allegations contained in her complaint can this Court dismiss her complaint.

HEIGHTS was aware, prior to the time Larry Michael Collins began working for HEIGHTS, of the dangers which faced its workers who entered a sewer line. HEIGHTS was aware that workers entering an unventilated sewer line could be rendered unconsciousness [sic] and killed. HEIGHTS was aware of this potential deadly danger because Larry Collins' supervisor had, a few months before Larry Collins' death, been rendered unconscious when entering an unventilated sewer line. The fact that HEIGHTS knew of these potential deadly dangers is underscored by the fact that HEIGHTS had

purchased air blowers and safety ropes for use in sewer lines. Furthermore, HEIGHTS was aware of the "Hazard Communication Act", passed in January 1, 1986, which specifically required municipalities to train employees concerning the hazards of chemicals found in sewer lines, the measures those employees could take to protect themselves from the hazards of those chemicals and to provide the employees with appropriate protective equipment.

Despite the prior experience of Larry Collins' supervisor, the passage of the Hazard Communication Act and the need for air blowers and safety ropes, HEIGHTS refused to provide safety training, safety warnings or gas detector meters to its employees who would, on a daily basis, face the deadly danger of going in to sewer lines. HEIGHTS also refused to train or instruct its employees in the use of air blowers and safety ropes, or to make sure that those air blowers and safety ropes were available when an employee or employees entered sewer lines to work.

On October 21, 1988, less than four months after he began working for HEIGHTS, Larry Collins was ordered to enter a manhole to try to unstop a sewer line. Within minutes, Larry Collins passed out and died of asphyxia due to suffocation.

Larry Collins died because HEIGHTS followed a policy of not providing safety equipment to its personnel, not training its personnel to recognize the hazards of entering a sewer line and not warning its employees of those hazards. HEIGHTS followed this policy of placing its employees in a deadly situation despite the fact that Larry Collins' supervisor had, only a few months before Larry Collins' death, passed out and nearly died in a sewer line under virtually the same conditions that killed Larry Collins.

2. *Most of HEIGHTS' Brief in support of its Motion To Dismiss is irrelevant.* In the first three and one-half pages of its Brief, HEIGHTS discusses the Texas Workers' Compensation Statute and that statute's effect on the Texas Tort Claims Act. That statute has absolutely nothing to do with the claim stated in the Plaintiff's original complaint. The Supreme Court of the United States has made it clear that governmental

conduct which is wrongful under 42 USC Section 1983, et sec [sic], cannot be immunized by state law. *Martinez v. California*, 444 U.S. 277, 284 (at note 8), 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980). The cause of action set forth in Mrs. Collins original complaint is based on Section 1983, and survives regardless of the Texas Workers' Compensation Statute.

In pages 4 - 5 ½ of its Brief, HEIGHTS talked about three cases in which Courts of Appeal have held that there is no constitutional right to a safe work place. *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986), *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986) and *Walker v. Rowe*, 791 F.2nd 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986). The constitutional right of which Larry Collins was deprived was the constitutional right of life, *not* the right to a safe work place. He was deprived of that constitutional right by a policy or custom of HEIGHTS to fail to train its employees in the use of safety equipment and its failure to warn its employees of the deadly dangers associated with going in to unventilated sewer lines. Furthermore, the *Washington* and *Walker* cases dealt with injuries caused to governmental employees by private citizens. In the *McClary* case, the Court went out of its way to point out that the injury to the plaintiff " . . ." however tragic, was an accident neither the occurrence of which nor the victim of which could have been predicted . . . ". *McClary* at 87. In the case at bar, Mr. Collins' death could have been predicted because of the prior experience of Mr. Collins' supervisor; furthermore, his death would have been avoided by HEIGHTS properly training and warning its employees and providing them with the requisite safety equipment all in compliance with the procedure envisioned by applicable law (the Hazard Communication Act).

It is also of importance to note that *McClary*, *Washington* and *Walker* were all decided prior to the Supreme Court decision in *City of Canton, Ohio v. Harris, et al* 109 S.Ct. 1197, (1989). In *Harris*, the United States Supreme Court specifically held that a municipality can be held liable under 42 U.S.C. Sec. 1983 for injuries which result from the failure of the city to train its employees.

3. *HEIGHTS failure to train its employees makes it liable for Larry Collins' death.* In a recent decision, the United States Supreme Court has specifically held that a municipality can " . . . be liable under 42 U.S.C. Sec. 1983 for constitutional violations resulting from its failure to train *municipal employees*." *City of Canton, Ohio v. Harris* (emphasis added), 109 S.Ct. 1197, 1200 (1989). In reaching this holding, the *Harris* Court made the following statement:

> Where a Sec. 1983 plaintiff can establish that the facts available to the city policy makers put them [sic] actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. *Harris*, supra, at 1208.

When these facts are established, the Court noted that it could be said that " . . . the municipality has made a deliberate choice to follow a course of action from among various alternatives." *Harris*, supra, at 1208.

In the case at bar, Larry Collins' supervisor had been rendered unconscious when he went into an unventilated sewer line only months before Larry Collins was killed. This near tragedy, months prior to Larry Collins' death, was a fact which would put the city policy makers on actual or constructive notice that the failure to train their employees and the failure to warn those employees concerning the dangers of going into a sewer line, together with the failure to train those employees in how to use the necessary safety equipment, was substantially certain to result in death. Thus, the dictates of *Monell* are satisfied by the facts of the case at bar, as recently confirmed by the holding in *Harris*, Supra.

The *Harris* Court has followed a path of reasoning which is consistent with the Fifth Circuit as announced in the case of *Languirand vs. Hayden*, 717 F.2d 220 (5th Cir. 1983), cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 353 (1984). In *Hayden*, the Fifth Circuit said that a municipality would be liable for injuries resulting from its failure to train when there was evidence of a pattern of similar incidents where people were injured or endangered by the failure to

train, or where there was serious incompetence or misbehavior that was general or wide spread. It would certainly seem that one previous near death resulting from an employee going into an unventilated sewer line would certainly provide evidence of the similar incident of injury or endangerment that is envisioned by *Hayden*.

There can be no doubt that the failure of HEIGHTS to train its employees, to warn them concerning the use of safety equipment and to properly provide them with safety equipment was the proximate cause of Larry Collins' death. With that training, warning and provision of equipment, Larry Collins' would either not have ventured in to the sewer line or the sewer line would have been properly ventilated. Furthermore, with proper retrieval equipment, Larry Collins' [sic] could have been removed from the sewer line even if he had gone into it and been overcome by noxious gases. Thus, the causal connection between HEIGHTS' policy and Larry Collins' death is established. See *Pembaur v. Cincinnati* 475 U.S. 469, 483-484, 106 S.Ct. 1292, 300, 89 L.Ed.2d 452 (1986).

WHEREFORE, PREMISES CONSIDERED, MYRA JO COLLINS respectfully request that this Court deny, in all things, the Motion To Dismiss now filed by The City of Harker Heights, Texas; and for such other and further relief to which she might show herself entitled.

Respectfully submitted,

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BY: /s/ Don Busby
DON BUSBY
State Bar #03490000

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	)	CIVIL ACTION
	)	NO. W-89-CA-168
V.	)	
	)	FILED
THE CITY OF HARKER HEIGHTS, TEXAS	)	AUG 31 1989
	)	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE WALTER S. SMITH, JR.:

The City of Harker Heights, Texas ("defendant") submits this Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Original Complaint for Failure to State a Claim Upon Which Relief Can be Granted and would show unto the Court as follows:

1.

On June 14, 1989, plaintiff Myra Jo Collins ("plaintiff"), pursuant to 42 U.S.C. § 1983, filed this suit against defendant alleging that defendant violated her husband's federal and state constitutional rights. On July 7, 1989, defendant timely filed a Motion to Dismiss Plaintiff's Complaint For Failure to State a Claim Upon Which Relief Can Be Granted and a Brief in Support of the Motion. On August 23, 1989, plaintiff filed her Response to defendant's Motion to Dismiss. This Reply responds to several invalid legal arguments contained in plaintiff's Response.

2.

Plaintiff appears wholly unable to cite the Court to any cases which even begin to embody her theory of liability. Without any case law in her favor, plaintiff is limited to taking ineffectual swipes at the authority of defendant, which

is directly on point, and to making the claim that defendant's authority has somehow been disapproved by a recent Supreme Court opinion with no bearing on the case before the Court.

3.

Plaintiff attempts to belittle the three cases cited by defendant, *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994, 107 S. Ct. 597, 93 L.Ed.2d 597 (1986); *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); as concerning only a "constitutional right to a safe work place" rather than "constitutional right of life, not the right to a safe work place." Plaintiff's Response at 4. Plaintiff's assertion is incorrect. In *McClary*, the court specifically stated that: "[T]he heart of this case, is whether the complaint sufficiently alleges a deprivation of life without substantive due process." 786 F.2d at 88. The court went on to hold: "In sum, under these circumstances, the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *Id.* at 89. Thus, the main distinction which plaintiff asserts exists between her case and the case directly on point does not exist.

Further, of the other two cases cited by defendant, one involved the death of the plaintiff's descendant [sic], *Walker*, 791 F.2d at 508, and the other involved serious injury to the plaintiff. *Washington*, 802 F.2d at 1479. Whether the issue is framed in terms of a constitutional right to a safe work place or a constitutional right to life and liberty, the result is the same – the constitution is not a code of occupational safety. *See Walker*, 791 F.2d at 508.

Plaintiff attempts to further distinguish her case on the basis that it involves training rather than a safe work place. Plaintiff ignores the fact that two of the above-cited cases dealt with training. In *Walker* the plaintiffs alleged that: "The guards did not receive enough training in controlling riots, and the existing training was poor." 791 F.2d at 509. In *McClary*, the plaintiff alleged that the crane operator did not

have a certificate of competency, thereby suggesting that the operator was inadequately trained. 786 F.2d at 84. Although the issue of allegedly inadequate training was raised in these two cases, the courts uniformly held that the plaintiffs did not have a constitutional claim. Plaintiff has not demonstrated any valid distinctions between her case and the three cases cited by defendant.

4.

Unable to provide a legitimate distinction between the cases on point and her own case, plaintiff suggests that the above-cited cases have somehow been disapproved by the recent Supreme Court case of *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989). *Harris* adds nothing to the discussion of the issue raised in this case. *Harris* involves a plaintiff who, while in police custody, was allegedly denied adequate medical care due to a failure to properly train police officers. It has long been the law in the circuit courts that municipalities could be held liable for failure to train municipal employees in certain circumstances. These cases had been in existence long before the above-cited cases, and *Harris* only serves to confirm existing law. *Harris* does not, therefore, in any way serve to disapprove defendant's cases.

To the extent that *Harris* could be relevant, *Harris* is, of course, easily distinguishable from the present case because it involved the abuse of power by a state official. *McClary*, 786 F.2d at 89. Further, *Harris* involved a pretrial detainee, and it is well established that the protections available to those in the state's custody are far different from those available to those not in the state's custody. As the Seventh Circuit colorfully explained in *Walker*: "The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten." 791 F.2d at 511. In summary, *Harris* does not in any way affect the validity of the cases which establish that plaintiff has failed to state a constitutional claim.

5.

Plaintiff has not cited a single case in favor of her unique theory which would vastly increase tort claims, clothed as constitutional claims, against municipalities. Plaintiff has not even attempted to explain why employees of municipalities should be entitled to an entirely new theory of liability which is not available to private employees. On the other hand, defendant has cited three thoughtful and well-reasoned opinions from respected courts of appeals which amply point out the flaws with the new scheme of liability proposed by plaintiff. Defendant therefore requests that the Court dismiss plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Stuart Smith
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ATTORNEYS FOR DEFENDANT

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 30 1989]

ORDER

On this day came on to be considered the Defendant's motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) in the above-styled and numbered cause. The Court, having considered the motion, is of the opinion that it is meritorious and should be granted.

Plaintiff is the widow of Larry Michael Collins, a former employee of the City of Harker Heights, Texas. Mr. Collins died on October 21, 1988 when he was asphyxiated by poisonous gases while working in a sewer line. Plaintiff brings suit under 42 U.S.C. § 1983, alleging that her husband's death resulted from the Defendant's violation of his federally protected constitutional rights. Plaintiff contends that Defendant's failure to train and warn its employees of the dangers associated with working in a sewer line represented a conscious indifference to her husband's constitutionally protected rights. Plaintiff further alleges that the conduct of Defendant establishes a policy or custom of placing its employees in deadly situations without proper safety precautions. Defendant has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted.

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be

dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

In order for a claim to exist pursuant to 42 U.S.C. § 1983 it is necessary that the Plaintiff be deprived of a federally protected right by a person acting under color of state law. A municipality can be held liable under § 1983 "when the execution of the government's policy or custom . . . inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). It is not necessary that the government policy or custom be reduced to a written procedure. It is enough that the act which inflicts the injury be representative of official policy. *Id.* at 694.

The first question in any case alleging municipal liability under § 1983 is whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197, 1203 (1989). Only when a municipality's failure to train its employees evidences a "deliberate indifference" can such a shortcoming be considered a city "policy or custom" that is actionable under § 1983. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981).

The degree of culpability required to find a violation of due process cognizable under § 1983 is something more than a negligent act. The Due Process Clause is simply not implicated by negligence or the mere lack of due care of an official causing unintended injury or loss of life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328-329, 106 S.Ct. 662, 663 (1986). Failure to train employees can only serve as the basis for liability under § 1983 when it amounts to a deliberate indifference to the rights of pesons effected and when that failure to train is the moving force behind the constitutional violation. *City of Canton*, ___ U.S. ___, 109 S.Ct. at 1205.

In this case the Plaintiff has alleged that the Defendant acted with deliberate indifference. The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. (*See City of Canton, Ohio v. Harris*, ___ U.S. ___, 109 S.Ct. 1197 (1989); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).) In this case the deceased was not in the custody of the Defendant, he was an employee. The Second Circuit has held that even deliberate exposure of public employees to a "high risk" does not violate the constitution because it is not an abuse of governmental power. *McClary v. O'Hare*, 786 F.2d 83 at 88 (2nd Cir. 1986). Improper actions by an employer do not violate the employee's constitutional rights simply because the employer is a governmental official. *Id.* at 89. In this case the acts of the Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right, which is required to find the city liable under § 1983. Accordingly,

IT IS ORDERED that the Motion of Defendant City of Harker Heights to Dismiss is GRANTED.

SIGNED this 30th day of October, 1989.

WALTER S. SMITH, JR.

Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

In The United States District Court
for The Western District of Texas
Waco Division

Myra Jo Collins,
Plaintiff,

v.

The City of Harker Heights, Texas,
Defendant.

Civil No. W-89-CA-168
[Filed Oct. 31, 1989]

JUDGMENT

In accordance with the Order of this Court entered on this day granting Defendant's Motion to Dismiss, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is DISMISSED.

SIGNED this 31st day of October, 1989.

WALTER S. SMITH, JR.
Walter S. Smith, Jr.
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS	X	CIVIL ACTION
	X	NO. W 89-CA-168
VS.	X	
	X	FILED
THE CITY OF HARKER	X	OCT 31 1989
HEIGHTS, TEXAS	X	

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO DISMISS

Plaintiff MYRA JO COLLINS submits the following supplemental brief in opposition to the motion to dismiss filed by Defendant CITY OF HARKER HEIGHTS, TEXAS ("The City").

INTRODUCTION

Plaintiff has brought this action under 42 U.S.C. Section 1983, alleging that The City's failure to train its employees in statutorily mandated work safety measures amounted to deliberate indifference to her husband Larry Michael Collins' ("Collins") substantive due process rights to life and liberty, and resulted in the deprivation of those constitutional rights. As thus pled, Plaintiff's Original Complaint states a cause of action under Section 1983, under the standard recently enunciated by the United States Supreme Court in *Canton v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412 (1989). This Court can and should reject the authority cited by The City and be guided instead by *Harris*, which plainly recognizes a cause of action against municipalities for their failure to train employees, under the "deliberate indifference" standard. Moreover, in view of the state statutory guarantees provided by the Texas Hazard Communication Act, Plaintiff can and will establish The City's deprivation of Collins' rights as created by that law, giving rise to a section 1983 claim.

DISCUSSION

I. WALKER, WASHINGTON AND WALKER [sic] DO NOT MANDATE DISMISSAL OF PLAINTIFF'S SECTION 1983 CLAIM

Defendant relies exclusively on three cases, none of which is controlling, and all of which are distinguishable and wrongly decided – particularly in view of the Supreme Court's subsequent decision in *Harris*. In *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986), a prison guard who had been attacked by an inmate brought a Section 1983 action, alleging that the attack resulted from the "reckless" failure of the public officials involved to remedy unsafe prison conditions. The District of Columbia Circuit found "no cases" recognizing an employee's right to a safe work place, without authority, and concluded that merely "reckless" failure to train was insufficient to establish the deprivation of a Fourteenth Amendment liberty interest. The court noted that the appellant did not allege intentional conduct, but merely gross negligence and recklessness. (*Id.* at 1479.)

In *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986), as in *Washington*, prison guards sued state prison officials, to recover for injuries suffered at the hands of inmates. The Seventh Circuit also rejected the notion of an employee's right to a safe work place, and concluded that "gross negligence" allegations were insufficient to state a cause of action under Section 1983.

Finally, in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), the Second Circuit held that a county employee killed in an accident involving a crane operated by a fellow employee who allegedly had not adequately been trained could not state a cause of action under Section 1983 for the county's failure to provide a safe work place.[1]

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[1] Plaintiff in *McClary* asserted claims of equal protection and procedural due process, as well as substantive due process. Neither equal protection nor procedural due process claims are raised here.

None of these decisions bars Plaintiff's claim here. First, as decisions of other circuits, they are not binding on this Court.

Second, these three cases are all factually distinguishable. In *Walker* and *Washington* only negligence or recklessness were alleged, whereas Plaintiff's claim here is based on the higher standard of "deliberate indifference."[2] Moreover, the immediate cause of the plaintiffs' injuries in those cases was the conduct of the third parties – the inmates – rather than of public employees or officials. Here, Plaintiff's claim is based directly on The City's misfeasance – its conscious failure to train its employees, amounting to deliberate indifference to Collins' physical safety and resulting in the deprivation of his substantive due process rights to life and liberty.

McClary is distinguishable on different grounds, which further illustrate the validity of Plaintiff's claim. In *McClary* the court stressed that the decedent had died as a result of "an accident neither the occurrence of which nor the particular victim of which could have been predicted. . . . " (786 F.2d at 87.) Here Plaintiff has alleged and will prove that, because of

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[2] The cases on which *Walker, Washington* and *McClary* rely are also not distinguishable on this issue. For example, in *Davidson v. Cannon*, 474 U.S. 344, 88 L.Ed.2d 677 (1986), the court rejected a prisoner's claim that he was assaulted by another prisoner because of the prison officials' *negligent* failure to protect him. (Citing *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662 (1986).)

In *Baker v. McCollan*, 443 U.S. 132, 61 L.Ed.2d 433 (1979), a man mistakenly identified as his brother was arrested and detained by the police. His Section 1983 challenge necessarily failed, for several reasons; first, he did not challenge the validity of the arrest warrant and therefore failed to establish a Fourth Amendment violation; second, he alleged only *negligence* on the part of the sheriff.

Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405 (1976), in which a convicted shoplifter brought an action against the city for publishing an allegedly defamatory flyer with his name on it, merely held that a person's interest in reputation alone, without a tangible interest such as employment, is insufficient to invoke the procedural protections of the due process clause.

past injuries to other, supervisory employees, also caused by The City's failure to train its employees, The City was fully conscious of the risk that additional employees, such as Collins, were at risk. The City could well have predicted and foreseen that additional untrained employees likely would be injured or killed in the sewer system.

Plaintiff's research has uncovered another relevant case, that The City has failed to cite. In *Rankin v. City of Wichita FAlls* [sic], Texas, 762 F.2d 444 (5th Cir. 1985), the Fifth Circuit held that plaintiffs did not state a cause of action under Section 1983 for the death of their son, based on the city's alleged gross negligence in operating the waste treatment plant where he had been employed. Though factually similar to this case, *Rankin* is fully distinguishable, in that plaintiffs alleged "gross negligence" only, and not conscious or deliberate indifference. Indeed, as the court in *Rankin* noted, "[t]he degree of negligence necessary to support a constitutional tort claim under section 1983 *has not yet been determined* by this court or the Supreme Court." (*Id.* at 447; emphasis supplied.) As discussed more fully below, the Supreme Court now has resolved the issue, with the standard of "failure to train amount[ing] to deliberate indifference." (*Canton v. Harris*, 103 L.Ed.2d at 426.) Plaintiff *has* alleged that The City acted with deliberate indifference in failing to train its employees.

Beyond these arguably narrow factual distinctions, a more fundamental and compelling reasons [sic] warrant disregarding *Walker, Washington, McClary* and *Rankin*. Simply put, they are wrongly decided.

These decisions err, first, in focusing on the employment relationship and in comparing public and private employment. The court in *Walker*, for example, observes that "[t]he Constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment[,]" and thus concludes that "the constitution is not a code of public safety." (791 F.2d 509, 508.) Similarly, the court in *McClary* concluded that "[w]e do not think that improper actions taken by employers violate an employee's substantive due process rights merely because

that employer is a governmental official." (786 F.2d at 89.) The *Rankin* decision also notes that the city "acted in this case in a role essentially indistinguishable from the role of a private employer. . . . " (762 F.2d at 449.)

This analysis is entirely misguided. The point is not to focus on the fact or nature of the employment relationship between the public entity and the injured or deceased worker, but on the identity of the defendant *as a governmental body*. What is significant is the abuse of governmental authority by public officials, manifest as deliberate indifference to the rights of *all* persons, whether employees or civilians. The fact that the victims in each of these cases happened to be an employee of the public entity simply should not divest them of their rights, under Section 1983, to redress the government's deprivation of their substantive due process rights.

The *Walker, Washington, McClary* and *Rankin* decisions also err in their baseless determination that public employees do not have a liberty interest in a safe work place, or in freedom from hazardous working conditions. As Judge Easterbrook acknowledged in *Walker*, public employment does afford certain constitutional protections:

> True, some portions of the constitution regulate the public employment relationship. For example, a public employee may not be fired for speech on matters of public concern, and he must be given an appropriate hearing before being fired if he has a 'property' interest in his job.

(791 F.2d at 510.)[3] Judge Easterbrook's gratuitous observation that "none of these particular rules is involved in this

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[3] Judge Easterbrook might have cited *Pickering v. Board of Education*, 391 U.S. 563 (1968) in support of a public employe's [sic] entitlement not to be fired for the exercise of his First Amendment rights, and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 449 (1985) and *Board of Education v. Roth*, 408 U.S. 504 (1972) for the proposition that a public employee may not be terminated without cause if he has a property interest in his job.

case" is mere dictum, at best. The fact that neither of the two particular examples identified by Judge Easterbrook was applicable in *Walker* hardly means that no other guarantees or entitlement might be implicated. Moreover, the *Walker* decision offers no authority for rejecting the claim that a public employee enjoys a life or liberty interest in freedom from unsafe working conditions.

In fact, as discussed more fully below, the State of Texas, by enactment of the Texas Hazard Communication Act, effective January 1, 1986, has recognized the right of public employees to be free from hazardous, unsafe working conditions. There is thus ample basis to conclude that public employees in Texas do have a substantive due process life and liberty interest in a safe work place. The City, by its conscious failure to train its employees pursuant to the Act, manifest its deliberate indifference to its employees' rights as guaranteed by the Act.

II. PLAINTIFF HAS STATED A CAUSE OF ACTION UNDER HARRIS FOR THE CITY'S DELIBERATE INDIFFERENCE IN FAILING TO TRAIN ITS EMPLOYEES

In *Canton v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412, decided *after Walker, Washington, McClary* and *Rankin*, the United States Supreme Court held that the failure of a municipality adequately to train its police officers could give rise to a Section 1983 claim "where the failure to train amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact." (103 L.Ed 2d at 426.) The Court added that the "deliberate indifference" standard was most consistent with the requirement of *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611 (1978), that a municipality could not be held liable unless the constitutional violation is the result of a policy or custom. (103 L.Ed.2d at 427.) Further, the deficiency in the training program must be "closely related" to the ultimate injury. (*Id.* at 428.)

As the Supreme Court noted, this "deliberate indifference" standard had been recognized by a number of circuit

courts, including the Fifth Circuit. In *Languiraud v. Hayden*, 717 F. 2d 220 (5th Cir. 1983), the court in essence adopted a standard of "conscious indifference." (*Id.* at 227.)[4]

The *Harris* decision thus solidified and clarified the evolving recognition that municipalities may be held liable for failure to train public employees, if conscious or deliberate indifference is established, and where the incident in question is not an isolated one.

Moreover, the *Harris* "deliberate indifference" standard for "failure to train" cases alleviates the concern expressed in *Walker, Washington* and *McClary* that in such cases Section 1983 might be reduced to a general tort statute. By permitting Plaintiff here to assert that The City deprived Collins of his substantive due process liberty interest in a safe work place, as well as his right to life itself, by its deliberate indifference in failing to train its employees, this Court will be imposing a standard or care far more limiting than that of mere gross negligence.

Under this standard, Plaintiff has stated a cause of action under section 1983. Plaintiff properly has pled, and the evidence will show, that The City failed adequately to train its employees in relevant work safety measures, as provided by

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[4] The Fifth Circuit in *Languiraud* concluded as follows:

> We conclude that if there is a cause of action under section 1983 for failure to properly train a police officer whose negligence or grossly negligent performance of duty has injured a citizen, that such failure to train must constitute gross negligence amounting to conscious indifference, and that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

(717 F.2d at 227-228.)

state statute; that such failure amounted to deliberate indifference, particularly in view of the known and repeated work place injuries; and that such deliberate indifference directly caused the deprivation of Collins' constitutional rights not to be deprived of life or liberty.

This Court can and should reject *Walker*, *Washington* and *McClary* and be guided by the United States Supreme Court's decision in *Harris*, which is directly on point and controlling, mandating denial of The City's motion to dismiss.

III. THE CITY'S DENIAL OF COLLINS' RIGHTS AS GUARANTEED BY STATE STATUTE AMOUNTS TO A DENIAL OF DUE PROCESS AND THEREBY GIVES RISE TO A CAUSE OF ACTION UNDER SECTION 1983

As alleged more fully in Plaintiff's Original Complaint, the Texas Hazard Communication Act, effective January 1, 1986, guarantees all employees, including "persons working for the State of Texas and its political subdivisions" (Section 3(6)), specific, substantive and procedural rights designed to ensure safety in the work place. Section 15(a) provides, in pertinent, as follows:

> [E]mployees *shall* receive training on the hazards of the chemicals [to which they are exposed] and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act.

(Emphasis supplied.)

This state statute thus creates affirmative rights for all employees in the State of Texas, including municipal employees such as Collins, amounting to a liberty interest in a work place free of the very hazards to which Collins succumbed. The Fourteenth Amendment protects against the deprivation of such rights without due process of law.

It is well established the deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983. (See, e.g., *Board of Pardons v.*

Allen, 482 U.S. 369, 96 S.Ct. 303 (1987) [state law stating that parole "shall" be granted under certain conditions creates liberty interest]; *Mills v. Rogers*, 457 U.S. 291, 73 L.Ed.2d 16 (1982) [mental patients' state statutory right to refuse anti-psychotic drugs]; and *Youngberg v. Romeo*, 457 U.S. 307, 73 L.Ed.2d 28 (1982) [conditions of confinement of mental patients].)

Plaintiff here thus has stated a cause of action against The City under Section 1983 for its conscious failure to train its sanitation employees pursuant to the Act, which failure amounted to deliberate indifference and resulted in the deprivation of Collins' state-guaranteed liberty interest in safe working conditions, in violation of the Due Process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should deny The City's motion to dismiss and allow Plaintiff to proceed on her Section 1983 action against The City.

DATED: Oct. 30, 1989

Respectfully submitted,

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MYRA JO COLLINS, Plaintiff	X	CIVIL NO. W 89-CA-168
VS.	X	FILED NOV 16 1989
THE CITY OF HARKER HEIGHTS, TEXAS	X	

NOTICE OF APPEAL

Notice is hereby given that MYRA JO COLLINS, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment granting the Defendant's Motion to Dismiss entered in this action on the 31st day of October, 1989.

Respectfully submitted this 15th day of November, 1989.

/s/ Don Busby
Don Busby
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Attorney for Plaintiff

NOTICE OF APPEAL

Myra Jo Collins,
Plaintiff-Appellant,
v.
The City of Harker Heights, Texas,
Defendant-Appellee.
No. 89-8029.

United States Court of Appeals,
Fifth Circuit
Nov. 2, 1990.

Widow of city sewer worker, who entered manhole to clear line and died of asphyxia before he could be removed, brought civil rights suit against city. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed for failure to state claim, and widow appealed. The Court of Appeals, Barksdale, Circuit Judge, held that city sewer worker did not die as a result of any abuse of government power, and thus, widow could not maintain § 1983 action against city.

Affirmed.

1. Civil Rights

City sewer worker, who was instructed to enter manhole to clear a line and who died of asphyxia before he could be removed, did not die as a result of any abuse of government power and, thus, widow of worker could not maintain § 1983 action against city. 42 U.S.C.A. § 1983.

2. Civil Rights

Mere negligence is insufficient to establish municipal liability under § 1983. 42 U.S.C.A. § 1983.

3. Civil Rights

In suit against municipality, as employer, under § 1983 for alleged failure to train employee, showing of direct causal link between municipal policy or custom and alleged constitutional

deprivation is not sufficient in itself; a separate standard of "abuse of government power" must also be satisfied. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

Myra Jo Collins appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her § 1983 action, which alleges that the failure of the City of Harker Heights, Texas, to adequately train its employees was a policy of deliberate indifference to her deceased husband's constitutional rights. Pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action does not lie. Accordingly, we AFFIRM.

I.

According to Collins' complaint, her husband began working in July 1988, for the City in its sanitation and sewer department, including entering sewer mains through manholes when there was a sewer line problem. In October 1988, as instructed, he entered a manhole to clear a line and died of asphyxia before he could be removed.

Collins alleged that: her husband's death was caused by the City's policy of not providing safety training to its employees; there was a custom for safety equipment to either not be taken to, or used at, the job site; no warnings or instructions were given on the hazards in entering sewer lines or how to protect against them; several months before her husband's death, his supervisor entered a manhole and was rendered unconscious, placing the City on notice of the risks in sending its employees into the lines; the City systematically and intentionally failed to provide the equipment, training or instruction required by the Texas Hazard Communications Act; and, *inter alia*, this pattern of behavior by the City was

a custom and policy of deliberate indifference to the Fifth and Fourteenth Amendment rights of its employees.[1]

The district court granted a Rule 12(b)(6) dismissal, expressly taking into consideration the applicable causation standard ("deliberate indifference to constitutional rights") set by *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 57 L.Ed. 1232 (1989), but noting that an "abuse of governmental power" was lacking, stating first:

> The question of a government policy demonstrating deliberate indifference toward the rights or well being of its citizens through a failure to train is normally dealt with in an entirely different context. Usually the issue is associated with decisions made by law-enforcement, prison or social services officials. In this case the deceased was not in the custody of the [City], he was an employee.

(Citations omitted.) It next ruled that a municipality's improper action against its employee does not constitute *ipso facto* deprivation of a constitutional right; and held that because a constitutional right had not been violated, an action under § 1983 could not lie.

II.

The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government—in its capacity as employer rather than as a governing authority—that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among those necessary for bringing § 1983

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[1] Collins also pleaded state law claims.

into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.[2]

Section 1983 provides in relevant part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, . . . secured by the Constitutional and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. § 1983. In *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that a § 1983 action could lie against a municipality only where it "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where "constitutional deprivations [occurred] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91, 98 S.Ct. at 2035-36.

Earlier, in *Paul v. Davis*, 424 U.S. 693 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court rejected the idea that "the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims." *Id.* at 699, 96 S.Ct. at 1159. Furthermore, mere negligence is insufficient to establish municipal liability under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664-65, 88 L.Ed.2d 662 (1986).

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[2] Of course, in reviewing the dismissal we must accept as true all well-pleaded averments and view them in the light most favorable to the plaintiff; "[w]e may uphold . . . [Rule 12(b)(6) dismissal] only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Baton Rouge Bldg. and Constr. Trades Council v. Jacobs Construction, Inc.*, 804 F.2d 879, 881 (5th Cir.1986); *see also Rankin v. City of Wichita Falls*, 762 F.2d 444, 446 (5th Cir.1985).

As stated fairly recently by the Supreme Court in the above-cited *City of Canton, Ohio v. Harris*, the "first inquiry in any case alleging municipal liability under § 1983 is . . . whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." 109 S.Ct. at 1203. *City of Canton* concerned a § 1983 action for violation of an alleged Fourteenth Amendment right to receive proper medical attention while in post-arrest police custody, arising in part out of inadquate training of the custodial police officers concerning when to summon medical care for a detainee. For such failure to train cases, the Supreme Court noted there was "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted" and held that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 1204 (emphasis by Court).

City of Canton does not permit all municipal failure to train actions to lie under § 1983, as is reflected by the court's restatement of its holding:

> Consequently, while claims such as [the detainee's]—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

Id. at 1206. *City of Canton* arises out of the use, or abuse, of government power; the holding springs from a citizen being held in custody after arrest, without the ability to control or choose a necessary course of action and being dependent upon the government to do so. The holding establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. In this Circuit, there is a separate standard that must also be satisfied—an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary

elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Keeping the standards in mind, we turn to Collins' complaint, in which she makes the requisite *Monell* and *City of Canton* allegations, charging that the City's "custom and policy of deliberate indifference towards the safety of its employees" violated the constitutional rights of her deceased husband. This notwithstanding, our holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City—one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a § 1983 action—whether there was a deprivation of a constitutional right.[3]

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[3] For such deprivation, the complaint alleges that the decedent "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City['s] . . . custom and policy of deliberate indifference toward the safety of its employees"; that the obvious need for proper training and use of safety equipment, especially as mandated by the Texas Hazard Communication Act, Tex. Health & Safety Code Ann. § 502.001 et seq. (Vernon 1990), and the concomitant failure to do so, "result[ed] in the violation of an employee's constitutional rights—the right to be free from harm and injury resulting in death." In her initial brief, Collins contends, for example, that "a public employee enjoys a life or liberty interest in freedom from unsafe working conditions"; that the Texas Hazard Communication Act, by "confer[ring] on public as well as private employees the right to be free from hazardous, unsafe working conditions," has "create[d] affirmative rights for all employees in the State of Texas, including municipal employees, . . . a liberty interest in a work place free of the very hazards to which the decedent succumbed"; that "[i]t is well-established that deprivation of a liberty interest created by state statute constitutes a violation of the due process clause of the Fourteenth Amendment, which may be redressed under Section 1983"; and that therefore, "[p]ublic employees in the State of Texas. . . . have a substantive due process liberty interest in a safe workplace." *See, e.g., DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2, 103 L.Ed.2d 249 (1989) (issue raised but not considered). At oral argument, Collins' counsel stated that this right to a safe workplace was the equivalent of a substantive due process right to life. Because we do not reach this issue, we express no opinion on it.

Collins contends that pursuant to *City of Canton*, her claim is sufficient to withstand Rule 12(b)(6) dismissal. But, as discussed above, Collins reads too much into *City of Canton*. It pertained to cases concerning use of governmental power on the governed, to government qua government, consistent with the reminder in *Daniels* that

> [o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states,' " *Paul v. Davis*, 424 U.S. 693, 701 [96 S.Ct. 1155, 1160, 47 L.Ed.2d 405] (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527], at 544 [101 S.Ct. 1908, 1917, 68 L.Ed.2d 420].

474 U.S. at 332, 106 S.Ct. at 665. Collins has received payments pursuant to the worker's compensation law of Texas;[4] and we express no opinion whether she might have a cause of action under state law.[5] In any event, and as held repeatedly in controlling precedent in this Circuit, she does not have a § 1983 claim against the City. Such precedent is found, for example, in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir.1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir.1987); and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989) (rendered after *City of Canton* and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)).

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[4] Needless to say, the receipt of such payments, evidenced, for example, by an affidavit filed with the City's Rule 12 motion, has no bearing on whether under Rule 12(b)(6), a § 1983 action can lie in this instance.

[5] The dismissal included her pendent state law claims.

In *Rankin*, a situation tragically similar to the case at hand, a municipal water treatment plant employee drowned while attempting to save another who had fallen into one of the tanks. The action against the city charged that work site safety defects constituted a municipal custom and practice which caused a deprivation of a constitutional right. This court affirmed the dismissal of the complaint for failing to state a claim under § 1983. Because the case predated *City of Canton's* fixing the causation standard, the court assumed that the complaint sufficiently alleged conduct to meet "whatever standard . . . is necessary to state a constitutional claim under section 1983." 762 F.2d at 447.

However, the court explained that simply alleging, or meeting, a causation standard for cases such as this is not enough to permit an action under § 1983.

> While some degree of government 'fault' is necessary to state a claim under the Constitution, to predicate liability under section 1983 totally on the mere degree of fault would be to convert the due-process clause into an ordinary tort statute and to lose sight of the fact that section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of state law.

Id. at 447-448. Accordingly, the court found possible § 1983 liability wanting, "because the existence of the alleged work place defects . . . did not amount to a misuse of government power. . . ." *Id.* at 449. The court further explained this controlling distinction:

> The City acted in this case in a role essentially indistinguishable from the role of a private employer; accordingly, we cannot view the City's failure to redress the patent but possibly severe defects in [the decedent's] workplace as an abuse of government power. [The decedent's] association with the treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been. This is not a case in which the government has exercised its power to incarcerate a citizen thereby making him dependent on the care of the state, nor are state representatives alleged to have violated the special obligation

> of government to refrain from intentional violations of constitutional rights.

Id. at 449. The court held that "the plaintiffs have made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*"; that the injury must "be attributed to a misuse of power made possible only because the City is clothed with authority of state law." *Id.* at 447, 449 (emphasis added).[6]

In *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987), also rendered before *City of Canton*, a police officer alleged that city policies allowed a prisoner to seize another officer's gun and shoot the plaintiff officer; that these policies "manifest[ed] deliberate indifference to or conscious disregard" for his safety. This court affirmed the Rule 12(b)(6) dismissal by applying the *Rankin* holding that the complaint failed to allege the requisite abuse of government power.

And, in *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir.1989), decided after *City of Canton*, this court applied the *Rankin* analysis to a § 1983 claim by jail detention officers, injured by inmates during an attempted escape. In doing so, it also applied similar decisions from other Circuits and the then recent decision by the Supreme Court in *DeShaney*, handed down only six days before *City of Canton*. *DeShaney* involved a § 1983 action against a governmental entity and its employees (the government) for child abuse injuries; it was alleged that the government's failure to protect the child from his custodial father constituted a Fourteenth Amendment substantive due process violation. Although, obviously, *DeShaney* did not involve the employment relationship in issue here, it is applicable because it holds that not all injuries arising out of an association or relation-

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[6] In addition to relying on *City of Canton*, Collins attempts to distinguish *Rankin* because it did not address whether the regulations allegedly violated by the municipality created a constitutional right. As discussed earlier, including in note 3, this argument does not concern the controlling issue in this case, abuse of government power; it concerns a separate issue or standard—deprivation of a constitutional right—that we do not reach.

ship with the government give rise to a § 1983 claim, even if all other elements for that claim are present.

One contention in *DeShaney* was that because the government was aware of the danger to the child and took some action to protect him, it acquired a duty to do so in a proper manner, and the failure to do so was an abuse of governmental power that constituted a substantive due process violation. In rejecting the contention, the Court noted it was "true that in certain limited circumstances the Constitution imposed upon the [government] affirmative duties of care and protection with respect to particular individuals," but this arose only

> when the [government] takes a person into its custody and holds him there against his will, [it is then that] the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the [government] by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause . . . In the substantive due process analysis, it is the [government's] affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

109 S.Ct. at 1004-1006 (citations omitted).

Accordingly, this court stated in *Benavides* that *DeShaney* "confirm[ed] the rationale of several of our similar recent cases," including *Rankin* and *Hogan*. 883 F.2d at 387. Based upon the facts in *Benavides*, this court noted that

> prison guards are employees who "enlisted, on terms they found satisfactory, and [who] were free to quit whenever

> they pleased." *Washington [v. District of Columbia]*, 802 F.2d [1478, 1482 (D.C. Cir.1986)]; *Walker [v. Rowe,]* 791 F.2d [507, 511 (7th Cir.), *cert. denied*, 479 U.S. 994 [107 S.Ct. 597, 93 L.Ed.2d 597] (1986)]. We applied the same rationale in *Rankin* when we noted that the plaintiffs' decedent's "association with the [defendant city's] treatment plant is not alleged to have been any less voluntary than his relationship with a private employer would have been."

883 F.2d at 388.

Collins contends that the determinative factor making this a proper post-*City of Canton* § 1983 action is simply that the defendant is "*a governmental body*" (emphasis by Collins); that we should "not . . . focus on the relationship between the public entity and the injured or deceased person"; that the alleged deliberate indifference, without more, constitutes the necessary "abuse of governmental authority"; and that the strict, or high, causation standard fixed by *City of Canton* removes the concerns that lead to establishing the abuse of government power standard. As part of, or alternative to, her contention that the abuse of government power standard employed by *Rankin* and other cases was replaced, or subsumed, by the *City of Canton* causation standard, Collins asserts that even if an abuse of government power must be alleged, she has done so sufficiently for Rule 12(b)(6) purposes, relying, in part, on the recent Eighth Circuit holding in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir.1989).[7]

In *Ruge*, the § 1983 action alleged that the City had a deliberate policy of not shoring ditches and required employees to work in them without warning of such danger. For Rule 12(b)(6) – dismissal, the city urged the court to apply the reasoning from

---

[7] Although Collins did not expressly plead an abuse of government power, or plead to the effect that the City's conduct was of a unique governmental character, we find for purposes of our discussion and in light of our standard of review for Rule 12(b)(6) dismissals that this necessary element for a § 1983 action of this type was pleaded sufficiently. But, the controlling and distinguishing factor is that even assuming abuse of government power was pleaded by implication, it cannot be present under any allegation in this action.

Rankin and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir.1986), "that in an employer-employee relationship where the plaintiff fails to show the state conduct complained of was of a 'uniquely governmental character' there is no abuse of government authority and thus no improper state action." 892 F.2d at 741.

The *Ruge* court, however, distinguished *McClary*, ruling that *McClary* held instead that the death "was not caused by any established state procedure and therefore did not constitute a constitutional deprivation."[8] *Id.* The *Ruge* court discussed, but did not attempt to distinguish, *Rankin*.

Ruge reversed the Rule 12(b)(6) dismissal, holding that "an abuse of government authority arises sufficient to state a cause of action under section 1983," when a death, including of a municipal employee, is caused by an inadequate municipal policy, adopted with the requisite culpability." *Id.* at 741 n. 6. In so holding, the court stated:

> However, where the state simply commits a tort, there is no misuse of government power when "the event, however tragic, was an accident neither the occurrence of which nor the particular victim of which could have been predicted." *McClary*, 786 F.2d at 87. We deem a policy, if adopted and proven, that would show a city *actively pursued* conduct which was deliberately indifferent to the constitutional rights

[8] Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated:

> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.

786 F.2d at 89 n. 6 (emphasis added).

> of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act. *See City of Canton*, 109 S.Ct. at 1204.

Id. at 742 (emphasis added).

We are unable to find sufficient shades of difference with the *Ruge* holding to allow us to not find it in conflict with our controlling precedent.[9] *Ruge* might compel finding here that the alleged municipal policy is an abuse of government authority or, stated differently, conduct that was of a "uniquely government character," sufficient to preclude Rule 12(b)(6) dismissal. We respectfully disagree. Furthermore, we are bound by our controlling Fifth Circuit precedent. As demonstrated, it has not been changed by a Supreme Court decision; in fact it is solidified by that Court's decisions.[10]

There was no abuse of government power. This is not an instance "when the state by the affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*, 109 S.Ct. at 1005. It is "not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual." *McClary*, 786 F.2d at 89. Nor was there "a misuse of power made possible only because the City [was] clothed with authority of state law." 762 F.2d at 449. Accordingly, this action cannot lie under § 1983.

III.

The judgment of the district court is AFFIRMED.

[9] As emphasized in the passage quoted above, one difference might be its seeming to include the requirement that the city "actively pursue" deliberately indifferent conduct. 892 F.2d at 742.

[10] Because our holding is mandated by controlling Fifth Circuit precedent, and because *Ruge* not this court, created an inter-circuit conflict, we have not sought en banc consideration by this court prior to rendering this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-8029

FILED NOV 02 1990
D.C. Docket No.W 89 CA 168

MYRA JO COLLINS,

Plaintiff-Appellant,

versus

THE CITY OF HARKER HEIGHTS
TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Texas

Before WISDOM, DAVIS and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the cost on appeal to be taxed by the Clerk of this Court.

November 2, 1990

ISSUED AS MANDATE NOV 26 1990

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

(4)

No. 90-1279

In The

Supreme Court of the United States

October Term, 1990

MYRA JO COLLINS,

Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Estate of a deceased municipal employee states a claim for relief, pursuant to 42 U.S.C. Section 1983, against the Municipality that employed Decedent when the Estate alleges all the elements of a Section 1983 claim including: (1) knowing and deliberately indifferent action "under color of state law" and the Municipality's deliberately indifferent policy or custom of failing to train or warn, and properly to equip or supervise its employees, including Decedent, in relation to grave life threatening risks the Municipality knows they will encounter; (2) deprivation of a constitutionally protected interest; and (3) a direct causal link between both the action under color of state law *and* the municipal policy or custom *and* the constitutional deprivation?

2. Whether "abuse of governmental authority" is an additional element of a Section 1983 claim, and if so whether that element can ever be established by a municipal employee whose injuries are alleged to have occurred, in the course of his employment, as a result of the Municipality's knowing and deliberately indifferent action and its policy or custom of deliberate indifference to Decedent's due process rights to life, liberty and personal security?

3. Whether the Estate of a municipal employee who is killed in the course of his employment because of his employer's knowing and deliberately indifferent actions and its policy or custom of deliberate indifference to his life, liberty or personal security can assert a due process claim arising directly under the Fourteenth Amendment?

4. Whether the Texas Hazard Communication Act, which requires all Texas employers (including municipalities) to inform and train employees, and their supervisors, whose work involves contact with hazardous chemicals concerning

QUESTIONS PRESENTED FOR REVIEW – Continued

workplace safety and to provide appropriate personal protective equipment, creates a life or liberty interest or "entitlement" to be free from the very workplace hazards to which Decedent succumbed, that is protected by the Due Process Clause and is enforceable pursuant to Section 1983?

PARTIES TO THE PROCEEDINGS

Counsel of record certify that the following listed persons have a direct interest in the instant case:

!. MYRA JO COLLINS, Petitioner, who was Plaintiff-Appellant below;

2. CITY OF HARKER HEIGHTS, TEXAS, Respondent, who was Defendant-Appellee below.

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OPINIONS BELOW

The October 30, 1989 Order of the United States District Court for the Western District of Texas granting Defendant-Respondent's Motion to Dismiss is not published. It is reprinted in the Joint Appendix at 29-31. The District Court's October 31, 1989 Judgment of Dismissal is not published. It is reprinted in the Joint Appendix at 32.

The November 2, 1990 decision of the United States Court of Appeals for the Fifth Circuit, affirming the dismissal, is published at 916 F.2d 284. It is reprinted in the Joint Appendix at 43-55 and its Judgment of Affirmance is reprinted in the Joint Appendix at 56.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 2, 1990. The Petition for Writ of Certiorari was docketed on February 4, 1991, and was granted on April 15, 1991. This Court's jurisdiction to review the Judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of: (1) *Section 1 of the Fourteenth Amendment* to the Constitution of the United States, (2) *Section 1983*, Title 42 U.S.C. and (3) *Rule 12(b)*, Federal Rules of Civil Procedure are included in the Appendix hereto at A-1 to A-2.

The *Texas Hazard Communication Act*, Texas Health and Safety Code Ann., Sections 502.001 *et seq.*, (Vernon, 1991 pocket part), and Regulations as they existed in October of 1988, Texas Administrative Code, Sections 295.1-295.9 (West, 1991), are included in the Appendix hereto at A-3 to A-33 (hereinafter Br. App.). (Citations to the Act and Regulations are provided in Point IV *infra* to the version in the Br. App. and to the extent possible, the current codified version).

STATEMENT OF THE CASE

Petitioner, Myra Jo Collins ("Collins"), Plaintiff and Appellant below, filed and served her Complaint on June 14, 1989. She alleged under 42 U.S.C. Section 1983, that her deceased husband, Larry Michael Collins ("the decedent"), was an employee of the Sanitation and Sewer Department ("Sewer Department") of the Respondent, the City of Harker Heights, Texas ("the City"), a Texas Municipal Corporation, which was Defendant and Appellee below.

Collins' Complaint alleges the following facts, which must be accepted as true when considering a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

(1) The City is a Texas Municipal Corporation. Complaint p. 2, ¶2 (Record at 7, Jt. App. at 5).

(2) In July 1988 the decedent began working for the City in its Sanitation and Sewer Department. His job responsibilities included entering sewer mains through manholes to investigate sewer line problems. Complaint pp. 2-3, ¶¶4-7 (Record at 6-7, Jt. App. at 5). Such work can be hazardous to life and personal security because of the sewer gases that accumulate in the lines. Complaint p. 3, ¶10 (Record at p. 6, Jt. App. at 5).

(3) The City required decedent to work in the sewer lines as part of his job, but provided the decedent no safety training. Complaint p. 3, ¶5 (Record at 6, Jt. App. at 5). No warnings or instructions were ever communicated or posted to alert him or other employees as to the grave hazards involved in entering the sewer lines; nor were he or other employees instructed on how to protect themselves against these hazards. Complaint p. 3, ¶6-7 (Record at 6, Jt. App. at 5). Although the City owned minimal safety equipment, including air blowers and safety ropes, Complaint p. 3, ¶8 (Record at 6, Jt. App. at 5), other rudimentary equipment, including gas detector meters, was lacking altogether. Complaint p. 3, ¶9 (Record at 6, Jt. App. at 5). Further, the City's Sewer Department employees, including decedent, were not trained or instructed

on how to use the available equipment, advised of its importance, nor required or advised to use it. Complaint p. 5, ¶1 (Record at 4, Jt. App. at 7); Complaint p. 3, ¶8 (Record at 6, Jt. App. at 5). The City's supervisors also were not instructed or required to use or have employees, including decedent, use safety equipment or measures. *Ibid.*

(4) The City through its supervisors was aware of the dangers to Sewer Department employees posed by the accumulation of gases in sewer lines. Complaint p. 3, ¶10 (Record at 3, Jt. App. at 5). Several months before the decedent was killed, his supervisor had been rendered unconscious by sewer gas while in a manhole. Complaint p. 5, ¶2 (Record at 4, Jt. App. at 7).

(5) The City's failure to train or warn and properly to equip disregarded the express and mandatory provisions of the State of Texas' Hazard Communication Act, which applies to municipal workers. Complaint p. 4, ¶¶14-19 (Record at 5, Jt. App. at 6).

(6) On October 21, 1988, as required by the City as part of his job, decedent entered a manhole to try to unstop a clogged sewer line. Decedent entered the 18 foot deep manhole as directed without harness, respirator, air blower, gas detector meter or any other safety device. He lost consciousness, and died of asphyxia due to suffocation (oxygen deprivation) before he could be removed. Complaint pp. 3-4, ¶¶11-13 (Record at 5-6, Jt. App. at 6).

(7) Finally, in concluding Paragraphs the Complaint specifically alleged violations of decedent's constitutional rights due to the City's deliberately indifferent actions and policy and custom as follows:

> 1. Prior to October, 1988, *the custom, policy and procedure* of the City of Harker Heights, Texas was not to train new employees of the dangers of working in sewer lines and manholes. Furthermore, there was a *custom* to not take any safety equipment to the job site when a manhole or sewer line was to be entered, or if some was taken, it was not used.
>
> 2. Prior to October, 1988, the City of Harker Heights *was on notice of the dangers* to which the

employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights.

Furthermore, *the Hazardous Communications Act* became effective January, 1986, which *imposed a burden on the City* of Harker Heights to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use.

3. There was a *custom and policy* to not post any type of safety warnings or signs concerning the dangers of entering sewer lines and the dangers of not utilizing their safety equipment.

4. Larry Michael Collins had a *constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.*

5. *The need for the training of these employees and the acquisition and use of safety equipment is so obvious, especially in light of the Texas Hazardous Communication Act and by such it was so obvious that such a custom and policy resulted in such an inadequacy that it would result in the violation of an employee's constitutional rights* – the right to be free from harm and injury resulting in death.

* * *

Causal Connection

The City of Harker Heights' *policy and procedure* not to train newly hired personnel in the sewer department before they were placed in underground sewer lines and manholes, their [sic] *policy and procedure* to not train employees in the use of proper safety equipment required by the State law and *policy and custom* not to require the safety

equipment to be on hand or used at the job site *were all the cause of the death and deprivation of the constitutional rights of Larry Michael Collins.*

Complaint pp. 5-7 (Record at 2-4, Jt. App. at 7-8) (emphasis added).

STATEMENT OF PROCEEDINGS BELOW

On July 7, 1989, the City filed a motion to dismiss Collins' Complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for her purported failure to state a claim upon which relief could be granted. (Jt. App. at 10). Collins filed her Response to the City's motion to dismiss on August 24, 1989 (Jt. App. at 20); the City filed its Reply on August 30, 1989 (Jt. App. at 25).

Without hearing or oral argument, on October 30, 1989, the District Court entered an Order granting the Motion. (Jt. App. at 29). The court's summarily stated reason for dismissal was that "even deliberate exposure of a public employee to a 'high risk' does not violate the constitution because it is not an abuse of governmental power" and the acts of "Defendant's superintendent as alleged by the Plaintiff do not amount to a deliberate indifference as to a constitutionally protected right." (Jt. App. at 31).

On October 31, 1989, Collins filed a Supplemental Brief in opposition to the City's motion to dismiss. (Jt. App. at 33). Judgement was entered on October 31, 1989. (Jt. App. at 32). Collins filed her timely Notice of Appeal on November 16, 1989. (Jt. App. at 42).

On November 2, 1990 the Fifth Circuit affirmed the judgment of dismissal, expressly on the sole ground that "pursuant to controlling Fifth Circuit precedent, because an abuse of government power is not implicated, a § 1983 action will not lie." 916 F.2d at 285 (Jt. App. at 43). The Fifth Circuit acknowledged that in her complaint Collins "makes the requisite *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)] and *City of Canton*, [*Ohio v. Harris*, 489 U.S. 378 (1989)] allegations charging that the City's 'custom and policy of deliberate indifference to the safety of its

employees' violated the constitutional rights of her deceased husband." 916 F.2d at 287 (Jt. App. at 48).

The Fifth Circuit also acknowledged that for purposes of a Rule 12(b)(6) motion, although not plead expressly: "an abuse of government power . . . [or] that the City's conduct was of a unique governmental character . . . was pleaded sufficiently." 916 F.2d at 290 n.7, (Jt. App. at 53 n.7). (In fact, under Texas statute, sewer work is exclusively a governmental function. *See* Texas Civil Practice and Remedies Code, Section 101.0215 (Vernon 1991).)

The Fifth Circuit affirmed because in its view this Court's holding in *Harris*:

> establishes only the degree of fault that must be alleged and proved in § 1983 actions against a municipality in certain failure to train cases; it does not hold that all such cases alleging the requisite causation lie under § 1983. *In this Circuit, there is a separate standard that must also be satisfied – an abuse of government power*. While this element is in many ways similar to, and often blends with, other necessary elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.
>
> 916 F.2d at 287 (Jt. App. at 47-48) (emphasis added). *See also* 916 F.2d at 290 n.7 (Jt. App. at 53 n.7).

In reaching its decision the Fifth Circuit specifically recognized that its decision and holding, and the other Fifth Circuit decisions upon which it relied, were in sharp conflict with a recent decision of the United States Court of Appeals for the Eighth Circuit, *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989). *See* 916 F.2d at 290-291 (Jt. App. at 53-55). In *Ruge*, the Eighth Circuit had reversed a district court Order sustaining a Rule 12(b)(6) Motion to dismiss a Section 1983 "failure to train" case, by the estate of a municipal sewer worker against his municipal employer, the facts of which were very similar to those alleged in the Complaint here.

In the instant case, the Fifth Circuit determined that:

> The question presented in this case is whether a plaintiff seeking recovery under Section 1983 for injury to a government employee must demonstrate, inter alia, that the conduct in issue was an abuse of governmental power. *More particularly, does alleged wrongful conduct by government – in its capacity as employer rather than as a governing authority – that deprives its employee of an alleged constitutional right give rise to a Section 1983 action*? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.
>
> 916 F.2d at 286 (Jt. App. at 45) (emphasis added). *See also* 916 F.2d at 287 (Jt. App. at 48).

Addressing that question, the Fifth Circuit held that even though Collins adequately alleged "abuse of government power" by "conduct that was of a unique governmental character," 916 F.2d at 290 n.7 (Jt. App. at 53 n.7) she could and had

> ' . . . made out at most the abuse of power which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government*'; that the injury must 'be attributed to a misuse of power made possible only because the City is clothed with authority of state law.'
>
> 916 F.2d at 288 (Jt. App. at 55) (emphasis in original), quoting *Rankin v. City of Wichita Falls*, 762 F.2d 444, 447, 449 (5th Cir. 1985).

The Fifth Circuit did not reach the issue "whether there was a deprivation of a constitutional right" enjoyed by decedent in the nature of a substantive due process right arising directly out of the Fourteenth Amendment as a life and liberty interest. 916 F.2d at 287 (Jt. App. at 48); 916 F.2d at 289 n.6 (Jt. App. at 51 n.6).

This question was reached by the Eighth Circuit in *Ruge* and decided in favor of plaintiff. *See* 892 F.2d at 738. The Eighth Circuit took the position that in such circumstances any "abuse of government power" component of a Section 1983 claim merges into the causation and federally protected rights components:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action.
>
> *Ruge*, 892 F.2d at 741.

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under Section 1983.
>
> *Ruge*, 892 F.2d at 741 n.6.

The Fifth Circuit also did not reach the question whether the Texas Hazard Communication Act (Br. App. at A-3 to A-17) conferred upon decedent an entitlement to be provided with safety training and measures by his municipal employer that creates a due process interest. The Fifth Circuit acknowledged that, unlike *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195, n.2 (1989), this issue was properly raised below in the Complaint, and in the briefs and arguments before it. 916 F.2d at 287, n.3 (Jt. App. at 48-49, n.3).

SUMMARY OF ARGUMENT

I.

Collins properly alleged all elements and requisites of a Section 1983 claim. She alleged that the City failed to train or warn its Sewer Department employees (including decedent) and its supervisors concerning grave life threatening workplace hazards, to inform them of workplace safety measures or to provide them with safety equipment even though the City owned some but not all appropriate equipment. Yet, through its Sewer Department supervisors, the City knew of the serious dangers to life and personal security, due to the accumulation of sewer gas, encountered by employees who worked in sewer lines. Collins further alleged that such safety measures, training and equipment were expressly mandated

by the Texas Hazard Communication Act. Nevertheless the City, knowing of the risks to decedent and with deliberate indifference to the danger to decedent, required decedent as part of his job to enter its sewer lines without training or warning him at all about the danger, or providing him with adequate equipment or supervision. She alleged further that the City's actions both resulted from *and* manifested its policy or custom of deliberate indifference to grave safety hazards to its Sewer Department employees' lives and personal security as protected directly by the Due Process Clause of the Fourteenth Amendment, and pursuant to a state-created life and liberty entitlement to protection from the very hazards to which the decedent succumbed. Finally, she alleged that the City's deliberately indifferent actions and policy and custom directly and proximately caused decedent's death.

These allegations establish the only two elements required for a Section 1983 claim: (1) that someone deprived decedent of a federal right and (2) the deprivation was under color of State law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). *See also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

The actions complained of are those of the City itself, and necessarily were "under color of state law." The federal rights involved are due process rights arising directly under the Fourteenth Amendment to the Constitution, *e.g.*, *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1978); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1990), and due process rights consisting of life and liberty (personal security) interests created by the Texas Hazard Communications Act. *E.g.*, *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 654 (1972); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied* 112 L.Ed.2d 145 (1990).

The allegations in the Complaint also establish that the City and its supervisors acted with knowing deliberate indifference to the risks to decedent's life and personal security, *e.g.*, *Daniels v. Williams*, 474 U.S. 327 (1986), pursuant to the City's deliberately indifferent municipal policy or custom of not training and warning and not properly equipping and

supervising its sewer workers, including decedent, in relation to the risks to which decedent succumbed. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1990). Further, the City's deliberately indifferent actions and policy or custom were direct and proximate causes of decedent's injuries. *E.g., Harris, supra; DeShaney, supra; Ruge, supra.*

By recognizing that Collins properly has asserted a Section 1983 claim this Court would *not* make Section 1983 a "font for tort law." *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (describing pre-trial measures for disposing of non-meritorious section 1983 complaints). Recognizing such a claim is also wholly consistent with the broad remedial purposes of Section 1983. *See, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

II.

No additional "abuse of government power" element is necessary under Section 1983. Abuse of government power necessarily inheres in the "under color of state law," federal right, and standard of liability components of a Section 1983 claim. If those components of the Section 1983 claim are satisfied, necessarily there has been an abuse of government power. *See, e.g., Ruge v. City of Bellevue*, 892 U.S. 738, 741 (and n.6) (8th Cir. 1989); *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348, 355 (11th Cir. 1989), *cert. denied sub nom. Spears v. Cornelius*, ___ U S. ___, 108 L.Ed.2d 785 (1990). *See also City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

This Court's decisions in *Daniels* and *Harris*, and other cases, refer to abuse of government power only to explain why mere negligence is not the standard of care for determining liability for injuries to due process rights to life or liberty (personal security) (*Daniels*) and why a municipality is liable for such injuries due to a "failure to train" *only* when the injury is "caused" by the municipality (*Harris*).

The allegations of the Collins Complaint satisfy the requirements of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) that decedent's federal rights were violated by action of the City and not by the action of an intervening private actor. *Accord Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989), *cert. denied* 107 L.Ed.2d 835 (1990).

III.

Section 1983 liability of a municipality, acting as employer, for violating its employees' federal rights was clearly established by the Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), a suit brought by municipal employees against their employer. As this Court held, Section 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 701.

Public employees' constitutional rights within the employment relation are protected under Section 1983 from invasion by the public employer, even though the rights of employees of private entities are not similarly protected. *E.g., O'Connor v. Ortega*, 480 U.S. 709 (1987). Among the rights so protected are public employees' First Amendment expressive and religious freedoms, procedural due process of law, the equal protection of the laws, Fourth Amendment protection from unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination.

Substantive due process protection is also available to public employees from "deliberate" decisions to deprive them of their life or liberty (personal security). *Ruge*, 882 F.2d 738; *Cornelius*, 880 F.2d 348. This follows from the fact that the Due Process clause "was intended to secure the individual form the arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331-332, citing cases.

As the Eighth Circuit correctly held in *Ruge*:

> The death of [a municipal employee] while working for the City does not in itself violate the constitution. The constitutional violation occurs when his

death is caused by an inadequate municipal policy, adopted with its requisite culpability.

892 F.2d at 741 n.6.

See Cornelius, supra. See also McClary v. O'Hare, 786 F.2d 83, 89 n.6 (2nd Cir. 1986).

Particularly in light of the City's knowledge of the risks to which it exposed decedent, and given the clear mandate of the Texas Hazard Communication Act, the City's actions are sufficiently shocking and reckless to constitute a violation of substantive due process rights. *See Daniels, supra.* Indeed, this Court's relevant decisions, for example in *Daniels* and *Harris*, and those of the Circuit Courts in *Ruge, Cornelius* and *McClary*, should be read with the *Restatement (Second) of Torts* and W. Prosser and W. P. Keeton's *Law of Torts* (5th Ed. 1984). Examined through those lenses, it is plain that as alleged here the City acted with sufficient recklessness as to have invaded decedent's substantive due process rights.

Moreover, decedent did not assume the risks to which he succumbed. *See Restatement (Second) of Torts; Restatement (Second) of Agency;* W. Prosser and W.P. Keeton, *The Law of Torts* (5th Ed. 1984). This fact renders inapposite most of the Circuit Court decisions relied upon by the Fifth Circuit, below. Those cases, by contrast with the instant case, involved injuries to policemen or custodial officers who were injured by private actors (perpetrators or escapees). *See also, DeShaney*, 489 U.S. 189. Such public servants, who accept jobs that involve known high risks, properly are presumed to have assumed such risks. By contrast, newly employed sewer workers cannot be presumed to know and accept the risks to which decedent succumbed.

IV.

The Texas Hazard Communication Act creates a life and liberty (personal security) interest that is subject to full due process protection. The Act includes substantive predicates that mandate protective action by the City. If obeyed by the City, the Act would have eliminated or ameliorated the risks to decedent. *See e.g., Kentucky Board of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 564 (1976). Given the risks to decedent's life resulting from the City's failure to obey the clear mandates of the Act, the City can assert no interest to justify its failure to comply. *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976).

When the state creates such a life and liberty - personal security entitlement, substantive due process protections apply against arbitrary and capricious government action. *E.g., Meador*, 902 F.2d 474; *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989). *See also, e.g., Olin v. Wakinekona*, 461 U.S. 238, 249 (1983); *Superintendent v. Hill*, 472 U.S. 485 (1985).

ARGUMENT

I. COLLINS HAS STATED A CLAIM FOR RELIEF UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND 42 U.S.C. SECTION 1983, AS SHE HAS PROPERLY ALLEGED AND MUST BE PRESUMED TO BE ABLE TO PROVE EACH AND EVERY ELEMENT OF SUCH A CLAIM.

This case presents pure questions of law. They concern the scope of the Due Process Clause of the Fourteenth Amendment and of 42 U.S.C. Section 1983.

The case has arisen in the context of a Motion to Dismiss "for failure to state a claim upon which relief can be granted" under Rule 12(b)(6), Fed.R.Civ.P. As recognized by the courts below, when considering a Rule 12(b)(6) Motion, a court must construe the Complaint liberally in plaintiff's favor; all facts well stated in the Complaint must be taken as true; and the action may be dismissed only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Complaint in this case must also be evaluated with due deference to this Court's repeated recognition that Section 1983 is a broadly stated remedial statute. It should be

construed generously to facilitate rights in the absence of clearly stated congressional intent to the contrary. *See, e.g., Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 683-685 (1978); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

In *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), this Court unanimously held that "by the plain terms of § 1983," to state a claim for relief a plaintiff must allege only two things: "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right has acted under color of state . . . law." *Ibid. See West v. Atkins*, 487 U.S. 42 (1988).

Other decisions of this Court have identified additional allegations necessary to survive a Rule 12(b)(6) motion, when the Section 1983 claim is asserted against a municipality or for invasion of the due process rights to life and the personal security component of liberty. None has added "abuse of government power" as an additional component of the Section 1983 claim.

The Complaint in this case properly alleges each and every element of a claim under 42 U.S.C. Section 1983 of deprivation by a municipality of the decedent's Due Process right to life and liberty-personal security. It therefore must survive a Rule 12(b)(6) motion. In particular, Collins adequately alleged that:

1. *Affirmative acts were performed under color of state law*. The Complaint alleges that decedent entered the sewer line in which he succumbed, at the City's direction and as a requirement of his job, and the City failed to warn or train him and properly to supervise or equip him. The City is a Texas municipal corporation, and therefore was acting under color of state law, as were its supervisors. *See, e.g., DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *West v. Atkins*, 487 U.S. 42 (1988); *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990); *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989).

2. *Both the City and its supervisors: (a) acted with knowing deliberate indifference to decedent's life, liberty-personal security and (b) pursuant to the City's own deliberately indifferent municipal policy or custom of not training or warning and properly equipping or supervising its employees with respect to the life threatening hazards involved in the tasks they were directed to perform*. The Complaint alleges: (a) that decedent's supervisor himself nearly succumbed to noxious sewer gas several months prior to decedent's death, when the supervisor had entered a sewer line without adequate equipment, and (b) that the City systematically failed to train or warn and properly equip and supervise its sewer workers, including decedent, despite its knowledge of the risks *and* the clear mandate of the Texas Hazard Communication Act.

These constitute allegations of deliberately indifferent and knowingly reckless acts toward decedent that transcend even gross negligence. *E.g., Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. City of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied sub nom. Cornelius v. Spears*, ___ U.S. ___, 108 L.Ed.2d 785 (1990). *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986). *See also Estelle v. Gamble*, 429 U.S. 97 (1976); *Brower v. County of Inyo*, 489 U.S. 593 (1989). They also constitute allegations of the City's custom or policy of deliberate indifference to decedent's life and liberty-personal security, in the sense that the need for "training [was] so obvious, and the inadequacy [was] so likely to result in the violation of constitutional rights, that the policy-makers of the City can reasonably have been said to have been deliberately indifferent to the need." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989). *See Ruge, supra; Cornelius, supra. See also, e.g., Jett v. Dallas Independent School District*, 491 U.S. 701 (1989).

3. *The City's knowing deliberately indifferent acts and policy or custom directly and proximately caused decedent's injury*. The Complaint alleges that the City's knowing and deliberately indifferent acts of sending decedent into the sewer line without training and warning or adequate equipment and supervision, and the City's policy or custom of

deliberate indifference in failing to train or warn, and properly equip and supervise were the direct and proximate causes of decedent's death. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989). *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Martinez v. California*, 444 U.S. 277 (1980). *See also Rizzo v. Goode*, 423 U.S. 369 (1976).

4. *The City's deliberately indifferent acts and policy and custom violated decedent's federally protected rights both: (a) arising directly under the Due Process Clause of the Fourteenth Amendment, and (b) consisting of a state created life and liberty-personal security interest protected by the Due Process Clause.* The Complaint alleges that decedent had a due process right arising directly under the Fourteenth Amendment, to be free from unreasonable risks to his life or personal security. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Daniels v. Williams*, 474 U.S. 327 (1986); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989); *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989). The Complaint also alleges that the Texas Hazard Communication Act also gave rise to federal due process rights, as the Act created substantive predicates and mandatorily imposed burdens on the City to train new employees regarding the dangers of entering a sewer line, to provide the necessary safety equipment and to train the supervisors and employees about its use. *E.g., Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983); *Mills v. Rogers*, 457 U.S. 291 (1982); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990) *cert. denied*, 112 L.Ed.2d 145 (1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

The Fifth Circuit, in the face of the Eighth Circuit's *Ruge* decision, has held that the Complaint nevertheless was properly dismissed because Collins could not allege an "abuse of government power" that arose from the City's role as government as opposed to its role as employer. As will appear hereafter, there is no such additional element to a Section 1983 claim, and Collins has properly alleged violations by the City of his constitutional rights.

By recognizing that Collins properly has asserted a Section 1983 claim, this Court would not be allowing Section 1983 to " 'become a font of tort law to be superimposed by whatever system may already be administered by the states,' *Paul v. Davis*, 424 U.S. 693, 701." *Daniels*, 474 U.S. at 332. *See generally, e.g.*, Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985), in which Justice Blackmun observed of several pre-*Daniels*, *Harris* and *DeShaney* decisions:

> Whatever else may be said about these [earlier] decisions, they have made it difficult, if not impossible, for a plaintiff who has only a state-law tort claim against a state official to hale the official into federal court under the guise of a § 1983 action. The Supreme Court gives ample evidence of being able to devise protective measures for itself and other Federal Courts.

Id. at 21.

As this Court has recognized in the qualified good faith immunity context:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, . . . damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure

> that . . . [municipalities] are not harassed by frivolous lawsuits.
>
> *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982), quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978).

At present, the Court's "protective measures" require that Collins' Section 1983 complaint and others like it must assert actions under color of state law. *E.g., DeShaney*, 489 U.S. 189. Such complaints must also assert knowing deliberate action, not mere or even gross negligence. *E.g., Daniels*, 474 U.S. 327. Such complaints must also assert a municipal policy or custom of deliberate indifference to the plaintiffs' personal security. *E.g., Harris*, 489 U.S. 378. They must assert that the policy was that of the ultimate municipal decision maker. *E.g., Jett*, 491 U.S. 701; *Praprotnick*, 485 U.S. 112. These complaints must also assert that these acts and policy or custom, rather than intervening efficient private act, caused decedent's injuries. *E.g., DeShaney*, 489 U.S. 1. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (rendering the contested issue of fact basis for denying summary judgment motions more difficult to establish); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (purposes of summary judgment); Rule 11, F.R.Civ.P. (sanctions); 42 U.S.C. Section 1988 (attorney's fees); *Chambers v. Nasco, Inc.*, ___ U.S. ___, 59 U.S. L.W. 4595 (June 6, 1991) (No. 90-256) (inherent power to assess attorneys fees and related expenses for a party's bad faith conduct).

II. THERE IS NO ADDITIONAL ABUSE OF GOVERNMENT POWER ELEMENT TO MAKE OUT A SECTION 1983 CLAIM, THAT MUST BE SATISFIED BY THE ESTATE OF A MUNICIPAL EMPLOYEE WHO SUES THE MUNICIPALITY FOR WHICH HE WORKED, FOR DEPRIVATION OF FEDERALLY PROTECTED RIGHTS THAT OCCURRED IN THE COURSE OF HIS EMPLOYMENT.

The Fifth Circuit acknowledged that Collins properly alleged all the components of a Section 1983 action stated in Point I, *supra*. 916 F.2d at 287 (Jt. App. at 48). However, that

court added a new additional element to the Section 1983 claim – abuse of government authority or power – which it held plaintiff could not satisfy. 916 F.2d at 287-291 (Jt. App. at 48-55).

According to the Fifth Circuit, no claim for relief can be asserted under Section 1983 because the acts and injuries complained of here occurred within "the decedent's relationship with the City – one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed." 916 F.2d at 287 (Jt. App. at 48). Thus Collins' allegations make out "at most the abuse of power [of] which any private employer might be guilty, *not the abuse of any particular authority or obligation held by the government.*" 916 F.2d at 288 (Jt. App. at 51) (emphasis in original), quoting *Rankin v. City of Wichita Falls*, 762 F.2d 444, 447 (5th Cir. 1985).

In the instant case, the Fifth Circuit said it derived the additional "abuse of government power" element from this Court's opinions in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) and *Daniels v. Williams*, 474 U.S. 327 (1986). 916 F.2d at 287-288 (Jt. App. at 47-49). In fact, the Fifth Circuit was simply reaffirming its decision in *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985), in which prior to *Harris* and *Daniels* it had created an additional "abuse of government power" element of the Section 1983 claim. *See* 916 F.2d at 288-289 (Jt. App. at 49-51).

Harris and *Daniels* are relevant precedents. However, contrary to the Fifth Circuit's assessment, neither *Harris* nor *Daniels* establishes a new or separate element for a Section 1983 claim. In those cases the Court referred to abuse of government power only to explain the reasons why mere negligence was *not* the standard for determining liability for violation of the substantive due process rights to life or liberty-personal security (*Daniels*) and to assure that deprivation of the federally secured right was "caused" by a municipality's "failure to train" (*Harris*). Thus, by imposing standards of deliberate misconduct in such cases the Court was guaranteeing that such claims would address only abuses of power, as opposed to mere negligent acts committed by

persons who happened to be acting under color of state law, and that the municipality's policy or custom actually "caused" the constitutional deprivation. *See Harris*, 489 U.S. at 385-392; *Daniels*, 474 U.S. at 331-336; *Davidson v. Cannon*, 474 U.S. 344 (1986). *Accord, e.g., Brower v. County of Inyo*, 489 U.S. 593 (1989); *Estelle v. Gamble*, 429 U.S. 97, 104-106 (1976). *See also Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1986) (applying the deliberate indifference standard to a First Amendment wrongful termination claim).

The Fifth Circuit also incorrectly relied on this Court's decision in *DeShaney* for its addition of an "abuse of government power" element. It adduced from *DeShaney* the proposition "that not all injuries arising out of an association or relationship with government give rise to a § 1983 claim, even if all other elements for that claim are present." 916 F.2d at 289 (Jt. App. at 51-52). According to the Fifth Circuit, government employment does not involve the kind of restraint on an individual's liberty that can give rise under *DeShaney* to a substantive due process life or liberty-personal security interest. As decedent was free to quit his job with the City, the Fifth Circuit reasoned, the City did not abuse its government power when, to decedent's peril, and with knowing deliberate indifference, the City directed him to enter the sewer line without training or warning him as to the hazard, and without providing him proper equipment or supervision, even though there is no suggestion that decedent knew of or accepted the risk. 916 F.2d at 289-91 (Jt. App. at 52-53) quoting *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989) (involving injury of a jail detention officer by a prisoner during an attempted escape).

The Fifth Circuit has misread *DeShaney* and misconstrued this Court's abuse of government power concept. In fact, *DeShaney* does not identify an additional abuse of government power element of Section 1983 claims; essentially it reaffirms the principles that a Section 1983 can be based only on violations of federal rights that are caused by a person actually acting under color of state law.

In *DeShaney* this Court held that no Section 1983 claim could be asserted because the harm to the abused child by his

father was imposed by the actions of a private person who was *not* acting "under color of state law." The Court also held that the Constitution is not a "font of positive protections" of people from injury by private persons.

As the Court stated in *DeShaney*:

> . . . nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion *by private actors*. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety or security. It forbids the State itself to deprive individuals of life, liberty or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon, supra*, at 348.
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> 489 U.S. at 195-196 (emphasis added).

Thus, in *DeShaney*, this Court held that neither element of a Section 1983 claim was present, as no federal right had been violated and no injury was "caused" by action under color of state law. The abused child's due process rights had not been invaded by the Winnebago County Department of Social Services because the harm suffered by the child were caused by the child's father, rather than by a state actor, while the child was in the father's, not the state's, custody. Further, the Court determined that the state played no part in creating the dangers the child faced and did nothing to render the child more vulnerable to those dangers. 489 U.S. at 201-203. Thus, no person "acting under color of state law" *caused* the harm to the abused child.

By contrast, in the instant case Collins has properly alleged affirmative actions by persons acting under color of state law that directly and proximately caused decedent's

death, in violation of his Due Process rights to life, liberty and personal security. *See also Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989) (distinguishing *DeShaney* in this fashion). In the instant case, decedent entered the sewer line in which he died as part of his job and at the instance of the City and its supervisors. Further, the City had a deliberately indifferent policy or custom of failure to warn or train and adequately to equip or supervise. Thus his injury was caused by acts performed under color of state law, and no efficient private actor intervened. Accord *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989); *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989).

At bottom, the Fifth Circuit's approach to constitutional protection of public employers turns on a distinction between a municipality acting as government in relation to a person, and a municipality acting as that person's employer. Such distinctions, however, have little place in federal constitutional analysis and in defining the scope of municipal liability under Section 1983.

A municipal employee does not leave the protections of the Constitution behind when he punches the time clock and begins work. *O'Connor v. Ortega*, 480 U.S. 709 (1987). ("Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer"). It is simply irrelevant to the constitutional and Section 1983 analyses that the same actions in the employment setting, if performed by a private employer, would not give rise to an invasion of a constitutional right. That is, after all, what the "under color of state law" requirement of the Section 1983 claim is all about. *See West v. Atkins*, 487 U.S. 42, n.15, (1988); *O'Connor, supra; Griffin v. Maryland*, 378 U.S. 130, 135 (1964).

The Seventh Circuit got to the heart of the matter recently in *Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990), a Section 1983 wrongful arrest case brought by a journeyman electrician and career employee of the City of Chicago, against his immediate supervisor and the supervisor's high management level superior, as well as the City of Chicago. Plaintiff alleged that he was arrested because his supervisor

made knowingly false statements to the Chicago police when plaintiff refused to leave his job site, by signing a complaint that plaintiff "had been suspended from his job [and] that his presence on the job was causing a safety hazard. . . . " 900 F.2d at 102-103. The district court had granted a motion to dismiss the Complaint and denied a subsequent motion to amend on the ground that the defendants had acted only as employers. 900 F.2d at 103.

Reversing the dismissal, the Seventh Circuit acknowledged and distinguished several circuit court decisions holding that an individual does not act under color of state law merely by supplying false information to an arresting officer.

> In those cases, however, a *private* party had provided the false information. By contrast, this case involves city supervisory personnel, who alleged abused their authority as city supervisory personnel, to secure without justification the arrest of an employee under their supervision at a city-owned facility. The fact that these city employees may have acted *in excess* of their authority is simply irrelevant to the color of state law inquiry. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941).
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> 900 F.2d at 104 (emphasis in original).

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE LIVES AND PERSONAL SECURITY OF ALL PERSONS, INCLUDING MUNICIPAL EMPLOYEES, FROM INVASION BY ARBITRARY AND CAPRICIOUS ACTIONS OF MUNICIPALITIES.

The instant case principally involves a substantive due process rather than a procedural due process claim. Collins asserts that the City invaded the decedent's substantive due process right under the Fourteenth Amendment, to life, liberty and personal security.

However, the constitutional rights issues need not be decided by this Court, as they were not addressed by the Fifth Circuit below. *See e.g.*, 916 F.2d at 286-287; (Jt. App. at 45-46, 48). That Court decided only that Collins could not properly allege or prove "abuse of government power," as decedent's injury occurred in the course of his employment relationship. *E.g.*, 916 F.2d at 286-287; (Jt. App. at 45-46, 48).

If this Court were to hold that the Fifth Circuit erred in requiring "abuse of government power" as an additional element of a Section 1983 claim, or in holding that "abuse of government power" could not be alleged in the instant case, this Court could remand the cause to the Fifth Circuit for it to address in the first instance the question whether decedent enjoyed and alleged a substantive due process right to life and personal security and alleged that the city violated that right. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Cf. DeShaney v. Winnebago Department of Social Services*, 489 U.S. 189, 195 n.2 (1989). If the Court proceeds to decide that issue, it should hold that Collins properly alleged a constitutionally protected interest cognizable under Section 1983.

A. A Full Panoply of Constitutional Rights Protects Public Employees from Adverse Actions by Their Employers Within the Employment Relationship.

Section 1983 liability of a municipality, acting as an employer, for violating municipal employees' federal rights was clearly established by the Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Plaintiffs in that case were female employees of the New York City Board of Education's Department of Social Services. They challenged the Board's official policy that compelled pregnant employees to take unpaid leaves of absence before such leaves were medically required. They

sued the Board, ranking Board officers and the Mayor, only in their official capacities.

Overruling *Monroe v. Pope*, 365 U.S. 167 (1961) on the point, this Court held that municipalities can be liable under Section 1983, observing: "there can be no doubt that § 1 of the Civil Rights Act [of 1871, 17 Stat 13] was intended to provide a remedy, to be broadly construed, *against all forms of official violation of federally protected rights*." *Monell*, 436 U.S. at 700-701 (emphasis added). The sweep of Section 1983, according to the Court, was not to be confined, "absent a clear statement in the legislative history. . . . " *Id.* at 701. As this Court recognized in *Maine v. Thiboutot*, 448 U.S. 1 (1980), Section 1983 is a broad remedial statute that encompasses the violation, under color of state law, of all rights, privileges and immunities secured by the federal Constitution and laws. *Accord Monell*, 436 U.S. at 683-685. Nothing in the legislative history of Section 1983 would preclude it from providing a remedy to public employees whose constitutional rights have been invaded by their public employers.

Indeed, Mr. Shellabarger who reported out the bill that has become Section 1983 said:

> This section of the bill, . . . not only provides a civil remedy for persons whose former condition may have been that of slaves, *but to all persons where, under color of State law, they may be deprived of rights* to which they are entitled under the Constitution by reason and virtue of their national citizenship.
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> Cong. Globe, 42d Cong., 1st Sess. App. 68 (emphasis added), quoted in *Monell*, 436 U.S. at 683; *Monroe*, 365 U.S. at 185 (1961).

In numerous cases since *Monell*, this Court has passed on Section 1983 claims against government prosecuted by government employees who allege violations of their federally protected rights. *E.g., Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989); *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Memphis School Dist. v. Stachura*, 477 U.S. 299 (1986).

In fact, even before *Monell* this Court had long held that claims of all kinds, arising under the Constitution and laws of the United States, can be asserted by public employees against their employers. To get to this point, the Court rejected the distinction or dichotomy between "rights," which are protected under the Constitution, and "privileges," which are not. *See e.g., Board of Regents v. Roth*, 408 U.S. 564, 571 n.9 (1972).

This dichotomy had gained force from Oliver Wendell Holmes' observation that a person may have a "right" to strike, but he has no right to public employment. *See McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). Economic and other realities eventually put to rest the notion that since people could "choose" not to accept public employment, they accepted it without the benefit of protections other than those volunteered by the public employer.

By the 1960's, in numerous cases addressing loyalty oaths and national security regulations affecting government employees, this Court soundly rejected the right-privilege distinction as a basis for constitutional analysis in public employment cases. *See Baggett v. Bullitt*, 377 U.S. 360 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Connell v. Higgenbotham*, 403 U.S. 207 (1971).

In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court also rejected distinctions similar to the Fifth Circuit's employer-governmental functions distinction in holding that municipalities enjoy no qualified good faith immunity under Section 1983. In particular, the Court discussed the governmental functions/proprietary functions distinction and the discretionary decisions/ministerial actions distinction historically applied to activities of municipalities. The Court held that neither distinction affords a basis for concluding that, in enacting Section 1983, Congress *sub silentio* intended to extend the qualified good faith immunities of its agents to the municipality itself. 445 U.S. 644-650. Similarly the distinction between the municipality acting as government, as

opposed to the municipality acting as employer, cannot be the basis for deciding whether the municipality is subject to liability under Section 1983. *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531-547 (1985) (rejecting the traditional governmental functions exception to Congress' power under the Commerce Clause because that exception proved "unsound in principle and unworkable"). *Compare Marsh v. Alabama*, 326 U.S. 501 (1946) *with NCAA v. Tarkanian*, 488 U.S. 179 (1988).

Thus, this Court has recognized that government employees' constitutional rights are subject to protection, within the employment relationship, from invasion by public employers or their agents. By contrast, private employees enjoy no such constitutional protection nor the benefits of Section 1983 claims. *See Yeksigian v. Nappi*, 900 F.2d 101 (7th Cir. 1990). The following are among the constitutional protections afforded public employees from adverse action by their employers:

1. *First Amendment expressive freedom. E.g., Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 283-284 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *See also Perry v. Sindermann*, 408 U.S. 593 (1972); *Baggett v. Bullitt, supra.*

2. *First Amendment religious freedoms. Cf. e.g., Hobbie v. Unemployment Appeals Com'n.*, 480 U.S. 136, 145 (1987); *Sherbert v. Werner*, 374 U.S. 398 (1963); *West Virginia Board of Education v. Barnett*, 319 U.S. 624 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

3. *Procedural Due Process – Protection of state created property interests in employment. E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). *City of St. Louis v. Prapotnick*, 485 U.S. 112

(1987). *See also Arnett v. Kennedy*, 416 U.S. 134 (1974) (by implication); *Connell v. Higgenbotham*, 403 U.S. 207 (1971).

4. *Procedural Due Process – Protection from false and stigmatizing charges that affect a person's future employment opportunities. E.g., Board of Regents v. Roth, supra; Codd v. Velger*, 429 U.S. 624 (1977); *Owen v. City of Independence*, 445 U.S. 622 (1980).

5. *The Equal Protection right to be free from invidious discrimination in employment. See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. ___, 111 L.Ed.2d 52 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Jett*, 491 U.S. 701; *Monell*, 436 U.S. 658. *See Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (by implication); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

6. *The Fourth Amendment prohibition of unreasonable searches and seizures. See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 654 (1989); *O'Conner v. Ortega*, 480 U.S. 709 (1987); *See also Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (Powell, J. concurring).

7. *The Fifth Amendment privilege against self incrimination. See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); *Slochower v. Board of Education*, 350 U.S. 551 (1956).

Lower federal courts have correctly sustained additional claims under Section 1983, brought by public employees against their employers for violation of federally protected rights, that occur within the employment relationship. *Ruge*, 892 F.2d 738 (deliberate indifference to risk to sewer worker's on the job personal security and life); *Cornelius*, 880 F.2d 348 (deliberate indifference to town clerk's on the job personal security); *Yeksigian*, 900 F.2d 101 (deliberately causing an employee's false arrest); *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1185-1189 (7th Cir. 1986) (on the job knowing and deliberate sexual harassment due to a municipal employer's policy or custom creating a hostile or abusive working environment); *Id.* at 1189-1192 (Posner, J. concurring) (policy or custom of failing to protect public

employee from sexual harassment). *See also Graham v. Davis*, 880 F.2d 1414, 1420-1421 (D.C. Cir. 1989) (no Section 1983 claim against the municipal employer based on injury by one plainclothes' police officer of another where there is no allegation that the injury resulted from the City's policy or custom of deliberate indifference to training, instruction, supervision and control of its officers; the officers may, however, sue one another).

As the cases demonstrate, it is much too late in the day for this Court to sanction the Fifth Circuit's unwarranted declaration that public employees cannot sue their employers under Section 1983.

B. Collins Has Properly Alleged That Decedent's Substantive Due Process Right to Life and Liberty-Personal Security Was Violated by the City's Deliberately Indifferent Actions and Policy and Custom.

As already noted in numerous cases, this Court has held that Section 1983 is a broadly stated remedial statute that should be liberally construed to assure protection of all federally secured rights in the absence of clear legislative history to the contrary. *E.g., Monroe*, 365 U.S. 167; *Maine*, 48 U.S. 1 (1980); *Monell*, 436 U.S. 658. To this end, the Court has acknowledged that Section 1983 is not displaced by the existence of state remedies that appear parallel to it. *See, e.g., Monroe, supra.* It has also acknowledged that artificial persons as well as natural persons may make claims under Section 1983. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

Most significantly, the Court has recognized numerous sources of federally secured rights that may be vindicated pursuant to Section 1983. Thus it has recognized that Section 1983 can be used to protect constitutional rights secured by specific provisions of the Bill of Rights, as well as substantive and procedural due process. *E.g., Daniels*, 474 U.S. 327. It has recognized that Section 1983 may be used to assert claims to redress violations of federal statutory rights, *see, e.g., Golden State Transit Corp., supra; Wilder v. Virginia*

Hospital Ass'n, 496 U.S. ___, 110 L.Ed.2d 455 (1990), as well as state created liberty and property interests. *See, e.g., Roth*, 408 U.S. 564. Section 1983 may even be employed to assert claims arising from constitutional provisions that concern the distribution of power between the federal and state governments, as opposed to personal liberty. *See Dennis v. Higgins*, 498 U.S. ___, 112 L.Ed.2d 969 (1991).

This Court has been particularly generous in its definition of "due process of law" under the Fourteenth Amendment. Due process plainly includes procedural due process. It also includes specific rights "incorporated" from provisions of the Bill of Rights and the remainder of the Constitution. Most importantly, this Court consistently has recognized that at the core of the constitutional doctrine of "due process of law" is substantive protection of all people from "*deliberate* decisions of government officials to deprive a person of life, liberty or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in original).

The Due Process Clause "was intended to secure the individual from the arbitrary exercise of the powers of government" *Ibid.*, quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884). As the *Daniels* Court stated:

> By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty or property," the Due Process Clause promotes fairness in decisions. And by barring certain governmental actions regardless of the fairness of the procedures used to implement them, *e.g., Rochin* [*v. California*, 342 U.S. 165 (1952) (stomach pumping)], it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How 272, 277, 15 L.Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment).
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> *Daniels*, 474 U.S. at 331-332.

This Court also has held in many cases that government may not arbitrarily deprive someone of life. Most of these decisions involve specific constitutional guarantees. *Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force can

violate the right to Fourth Amendment protection from unreasonable searches and seizures); *Graham v. Conner*, 490 U.S. 386 (1989) (excessive force gives rise to a Fourth Amendment claim and analysis); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (same); *Furman v. Georgia*, 408 U.S. 238 (1972) (arbitrary use of death penalty violates Eight Amendment). This Court has, however, expressly recognized the substantive due process right to a more generalized freedom from deliberate and unjustified intrusions on life and personal security. *E.g., City of Canton v. Harris*, 489 U.S. 378 (1989); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Daniels v. Williams*, 474 U.S. 327 (1986).

Most commonly decisions addressing substantive due process rights to life, liberty or personal security concern government action (or inaction) that injures persons in government custody, or quasi-custody, or persons interacting with the police. Conceptually, however, such substantive due process protection has not been and should not be limited to such circumstances. *See, e.g., Ruge*, 892 F.2d 738; *Cornelius*, 880 F.2d 348. *McClary v. O'Hare*, 786 F.2d 83, 89 n.6 (2d Cir. 1986). For example, if the City's Sewer Department had a policy or custom of deliberate indifference to serious avoidable risks of explosions due to accumulated sewer gas, surely its inhabitants could sue the City under Section 1983 if such explosions caused them injury.

There are, moreover, graduations of government "custody" or restraint on liberty. At the most extreme are incarceration, arrest or civil commitment situations in which the injured individual is physically restrained by government. Other situations involve those of public school students, who are constrained by mandatory attendance laws. *Stoneking v. Bradford School District*, 882 F.2d 720 (3rd Cir. 1989). Still others involve children placed in state regulated private foster homes. *See Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989).

Public employment usually does not involve custodial constraint on the worker's liberty. There are, however, constraints on the worker's liberty and mobility during working

hours. *See generally, Cornelius*, 880 F.2d 348. Moreover, it is a gross fiction, in a society that constantly suffers from significant levels of unemployment and underemployment, to pretend that government employees are free to quit their jobs to avoid unnecessary, and to them unapparent, risks to life and safety. It is a further fiction to suggest that the government employer owes its employees no substantive due process obligation to warn, train, supervise and equip them with respect to risks to the employees' life, liberty and personal security that are known to the employer and easily could be eliminated or ameliorated by it, were it not for the employer's policy or custom of deliberate indifference to those risks. *See Ruge*, 892 F.2d 738; *Cornelius*, 880 F.2d 348; *McClary*, 786 F.2d at 89 n.6.

There is sufficient play in the Due Process Clause itself for more general substantive protection of life and personal security, even within the employment relationship, for example where actions "under the color of state law" are so gross as to "shock the conscience." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) citing *Rochin v. California*, 342 U.S. 165 (1952). Thus, in *Ruge* the Eighth Circuit correctly held that:

> The death of [a municipal employee] while working for the City does not, in itself, violate the constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with its requisite culpability.
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> 892 F.2d at 741 n.6.

See also McClary, 783 F.2d at 89 n.6; *Cornelius*, 880 F.2d at 348.

The facts alleged in the instant case, as in *Ruge*, "shock the conscience." They involve deliberately indifferent conduct by the City, despite a recent similar life threatening event involving decedent's supervisor, taken in the face of mandatory state obligations to warn, train, and properly equip and supervise.

1. The City Acted with Sufficient Recklessness as to Have Invaded Decedent's Substantive Due Process Rights.

In *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), the Second Circuit affirmed the granting of a Rule 12(b)(6) motion to dismiss a Section 1983 wrongful death claim brought by the estate of a county highway department employee against state and county officials. "The actual holding in *McClary* is that the decedent's death was not caused by any established state procedure and therefore did not constitute a constitutional deprivation. 786 F.2d at 87." *Ruge*, 892 F.2d at 741. Lack of foreseeability (which was alleged in the instant case and in *Ruge*), was another problem in *McClary*. *See McClary*, 786 F.2d at 87, citing *Parratt v. Taylor*, 451 U.S. 527 (1981). Moreover, as the Fifth Circuit acknowledged in the instant case:

> Without expressing an opinion on the *McClary* holding, we do note that the *McClary* court stated [786 F.2d at 89 n.6 (emphasis added)]:
>
> Although we hold that reckless acts of a government employer that harm employees do not give rise to a substantive due process violation as long as the challenged conduct is not *uniquely governmental in character*, we by no means intend to exclude grossly negligent, reckless, or intentional abuses of *governmental* authority from the purview of section 1983. (Citations omitted). Nor do we view this decision as a grant of immunity to government employers acting as such. Where harms caused by government employers to their employees are attributable to the abuse of the government's authority rather than to an ordinary tort, such harms would continue to be actionable under § 1983.
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> 916 F.2d at 290 n.8 (Jt. App. at 54 n.8) (emphasis in original).

McClary thus properly built upon this Court's *Daniels* decision. The Section 1983 allegations suggested by the *McClary* court as necessary to survive a Rule 12(b)(6)

motion, are the equivalent of the allegations of the instant complaint, with the addition of the *Harris* allegations against the City. As will appear below, this Court's *Harris* and *Daniels* analyses, as well as the *McClary* court's dictum and the Complaint in this case also track the standards of conduct elucidated by the *Restatement of Tort* and *Prosser*.

In *Daniels*, this Court held that violations of substantive Due Process rights were limited to claims based on "*deliberate* decisions of government officials to deprive a person of life, liberty or property." 474 U.S. at 331 (emphasis in original). Thus "mere lack of due care . . . [constituting] no more than a failure to measure up to the conduct of a reasonable person" is insufficient to make out a substantive due process violation. *Daniels*, 474 U.S. at 332. "Deliberate indifference" which is more than simple or gross negligence, but does not necessarily equate to intentional misconduct, is required. *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *see e.g., Estelle v. Gamble*, 429 U.S. 97, 104-106 (1976).

Harris originates from similar concerns, as municipal liability may not be based on the doctrine of *respondeat superior*, but must be based on the municipality's "policy or custom," which becomes the "moving force [behind] the constitutional violation." *Monell*, 436 U.S. at 694; *Polk County v. Dodson*, 454 U.S. 312 (1981). Hence in *Harris* this Court adopted essentially the same "deliberate indifference" standard establishing municipal liability for failures to train. Thus the Court held that:

> Only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under Section 1983. . . . Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality – a "policy" as defined by our prior cases – can a city be liable for such a failure under Section 1983.
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> 489 U.S. at 389.

As Representative Sheldon said, arguing for passage of the statute that became Section 1983:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through the courts, in times of peace, directly to the individual who is deprived of his rights, . . . whether through the positive act *or the default of the State authorities*.
>
> Cong. Globe, 42d Cong. 1st Sess. 367-68 (1871) (emphasis added).

Hence, in *Harris* the Court held that in a failure to train case the requisite "deliberate indifference" can be inferred from context:

> But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of the City can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.
>
> 489 U.S. at 390 (footnotes omitted).

Nothing in this Court's language or reasoning excludes municipal employees from this level of protection under Section 1983.

The *Restatement (Second) of Torts* and W. Prosser and W. P. Keeton, *Law of Torts* (5th Ed. 1984) are highly apposite in their analyses of standard of care. The usual tort standard of care is the "reasonable person" standard described in the *Restatement*, Section 283. To avoid being negligent (*i.e.*, to avoid the "unreasonable risk of harm," described in Section 282) an actor must conform to the standard of conduct of a reasonable person under like circumstances.

The *Restatement* contrasts negligence with recklessness on the basis of the proportion of harm to utility. Section 282, comment e; Section 500. Under the *Restatement* scheme of things, one is negligent if he fails to act as a reasonable person would in order to avoid unreasonable risks to others;

one moves from negligence to recklessness if the risk he fails to avoid is one completely out of proportion to the utility of person's activity. The reckless actor must also know or have reason to know of the facts that create the risk. Section 500, comments a, b, and c. The *Restatement* defines "intentional misconduct" as involving both knowledge that the harm is substantially certain to occur and the intent to cause the harm. Section 282, comment d; Section 500, comment f. Thus recklessness is distinguished from intent in two respects: the reckless actor creates a risk of harm, rather than a substantial certainty, and the reckless actor does not intend to cause the harm. *Accord*, Sections 8A, 870.

Prosser and Keeton, in Section 34, discuss two slightly different schemes of degrees of negligence. They note that some courts have recognized three levels of negligence: slight negligence, ordinary negligence, and gross negligence – gross negligence being not just a want of ordinary care, but want of any care at all. Pages 209-212. They then go on to discuss "wilful, wanton and reckless" actions. Pages 212-214. Prosser and Keeton note that courts describe gross negligence as worse than ordinary negligence, but not involving the "reckless disregard" of consequences that fits into the "wilful, wanton and reckless" category. They go on to define "wilful, wanton and reckless:"

> . . . the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. . . . [This will be found] where the defendant, *whatever his state of mind*, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position.
>
> *Id.* at 213-214 (emphasis added).

This is very much like the standard described in the *Restatement* for recklessness.

Thus between Prosser and Keeton and the *Restatement*, one can create a scale of increasing negligence: slight negligence, ordinary negligence (failing to act as a reasonable man would to avoid risk), gross negligence (failing to act even as a careless man would), and recklessness (where not only is the risk way out of line, but the actor knew or should have known of the risk). Recklessness thus carries the implication of "conscious disregard" lacking in ordinary or even gross negligence.

Intentional torts involve a subjective state of mind, proven by either direct evidence or inference, that the actor in fact both intends to perform the deed *and* produce the harmful consequences of the act. *Restatement*, Section 870, comment a; Prosser and Keeton, Section 8 at p. 36. The continuum from "intent" to ordinary "negligence" is described as follows:

> Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases even further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.
>
> *Restatement*, Section 8A, comment b at page 15.

See also, Prosser and Keeton, Section 8 at p. 36.

Sometimes the distinctions along the continuum are fine. But as this Court observed in *Daniels*, "the difference between one end of the spectrum – negligence – and the other – intent – is abundantly clear. *See* O. Holmes, The Common Law 3 (1923)." 474 U.S. at 335. *Accord*, Prosser and Keeton, Section 8 at p. 36. By allowing substantive due process-personal liberty claims and municipal liability-failure to train claims of municipal employees under Section 1983, only when based upon proper allegations of "deliberate indifference", there is no possibility that Section 1983 will become a font of ordinary tort liability. Section 1983 would remain available to redress only arbitrary and capricious acts of government.

2. Decedent Did Not Assume the Risks to Which he Succumbed.

This case does not involve an employee's acceptance of known risks inherent and apparent in the specific job he has taken. *Compare Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990). Unlike a fireman, a prison guard or a police officer, decedent did not volunteer for an obviously inherently and extraordinarily hazardous job. *See Ruge*, 892 F.2d 738; *Cornelius*, 916 F.2d 284. *See also, McClary*, 786 F.2d at 87 (2d Cir. 1986) (absence of foreseeability).

Once again it is useful to examine Prosser and Keeton and the Restatements. They reveal that assumption of risk bars liability in two situations: where the plaintiff has given his express consent to relieve the defendant of his duty of care, or where the plaintiff impliedly has consented to the risk of harm by voluntarily going forward in the face of a danger which the plaintiff knows of and appreciates. Interestingly enough, the doctrine has its roots in cases where the parties were master and servant. Prosser and Keeton, Section 68, p. 480.

Express consent to unnecessary risk is generally not applied in the employment setting. The bargaining power of the employer is such that the employee's consent to relieve the employer of liability is held not to be voluntary.

Proof of the plaintiff's implied acceptance of a risk depends on two elements. The plaintiff must know of and appreciate the risk, and must voluntarily choose to take the risk. Thus, the risk is not assumed if the employee only "has reason to know of the danger . . . [or] knows the facts but does not appreciate the risks; [is assumed] only where the Servant not only knows the facts but also realizes the likelihood of danger to him as a result of them." *Restatement (Second) of Agency* Section 521, comment c. Knowledge of a defect alone is not enough; the plaintiff must comprehend the danger presented by the defect. The standard is a subjective one. Unless the risk is "clear and obvious" to the injured person the question is not whether a "reasonable person" would appreciate the danger, *but whether the plaintiff did appreciate it*. Prosser and Keeton, Section 68, pp. 487-488.

It is the element of knowledge, and the dangers a plaintiff is assumed to understand, that go to the difference between a sewer worker and someone taking an obviously hazardous job, for example a policeman, prison or jail guard, or firefighter. The *Restatement (Second) of Torts* points out that "the risk inseparable from the great majority of abnormally dangerous activities is, however, a matter of such common knowledge and general notoriety that, in the absence of special circumstances . . . a plaintiff may often be found to have the knowledge notwithstanding his own denial." Section 523, comment c. The *Restatement* uses the example of a plaintiff who takes a job driving a truck full of nitroglycerin. *Id.* comment d.

The *Restatement (Second) of Agency* states that "[i]f the risk exists at the beginning of the employment and is a risk arising from the general nature of the business or the manner in which it is conducted . . . it is ordinarily inferred that the servant knows of and understands it . . . [I]n an employment in which the risks are obvious only to those experienced in it, it may be shown that the employee was inexperienced and hence did not realize them." Section 521, comment c. Even an inexperienced firefighter, police officer, or jailer would have a hard time pleading or showing that he did not understand that he might get burned, or hurt by a perpetrator or a prisoner. By contrast, an inexperienced sewer worker might easily not understand the dangers of sewer gas – especially where, as here, the employer failed to warn and train him and to properly equip and supervise him regarding those dangers.

Thus, unlike what may have been true of most of the Circuit Court cases relied upon by the Fifth Circuit below, 916 F.2d at 288-289 (Jt. App. at 49-53), it cannot be said here that decedent "assumed" the risk to which he actually succumbed, as it was not a risk he knew or had to know was inherent in his job. By contrast to the instant case, most of the Circuit Court decisions relied on by the Fifth Circuit, 916 F.2d at 288-289 (Jt. App. at 49-52), involved police officers and jailers injured by prisoners or arrestees. *See de Jesus*

Benavides v. Santos, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986). Those decisions are inapposite because the plaintiffs assumed just those risks when they took their inherently dangerous jobs. *See Cornelius*, 916 F.2d 284.

Those cases are also inapposite because the plaintiffs' injuries were not caused by persons acting "under color of state law" but were caused by intervening private actors. *Compare Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991) (one resident of a public housing project shot by another resident) *with Graham v. Davis*, 880 F.2d 1414, 1420-1421 (D.C. Cir. 1989) (two plainclothes policemen shot one another). *See DeShaney*, 489 U.S. 189; *Stoneking v. Bradford School District*, 882 F.2d 720, 724-725 (3rd Cir. 1989).

In the instant case, as in *Ruge* and *Cornelius*, Collins has alleged knowing, deliberately indifferent conduct under color of state law that, together with the City's policy or custom of deliberate indifference to decedent's life and liberty-personal security, caused plaintiff's death. If a municipal employer need not stand to answer such a claim, it is hard to conceive of a case in which it must respect its employees' substantive due process rights to life or personal security. Compare, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

IV. THE TEXAS HAZARD COMMUNICATION ACT CREATES A FOURTEENTH AMENDMENT DUE PROCESS LIBERTY INTEREST, THAT MAY BE ASSERTED UNDER SECTION 1983, IN PROTECTION FROM THE VERY HAZARDS TO WHICH DECEDENT SUCCUMBED.

In *DeShaney*, this Court reserved the question whether state statutes that give a person "an 'entitlement' to receive protective services in accordance with the terms of the statute, create an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972)." 489 U.S. at

195 n.2. The issue was not pleaded in the *DeShaney* complaint and was raised for the first time in this Court. *Ibid.*

By contrast, the issue or claim that decedent enjoyed a due process right because of the Texas Hazard Communication Act (Br. App. at A-3 – A-17), was pleaded in Collins' Complaint (Jt. App. at 6, ¶¶ 14-19; at 7, ¶ 5), raised before the District Court in briefs (Jt. App. at 22, 36-40), argued to the Fifth Circuit, 916 F.2d at 287 n.3 (Jt. App. at 48-49 n.3), and presented in Petitioner's Petition for Writ of Certiorari and Reply Brief. Hence it is properly before this Court.

However, neither the District Court nor the Fifth Circuit reached the issue. *See* 916 F.2d at 287 n.3 (Jt. App. at 48-49 n.3). Hence, this Court need not reach the issue in this case, even if it rules in Collins' favor. It may remand to the Fifth Circuit for its reconsideration. *See* Point III, *supra*, at 24.

If the Court chooses to reach the issue in this case, it should decide that Collins has properly alleged a Fourteenth Amendment Due Process life and liberty violation arising from the substantive predicates of the Texas Hazard Communication Act, which mandates protective action by the City that would have eliminated or ameliorated the risks to decedent. *Cf., e.g., Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Board of Regents v. Roth*, 408 U.S. 564 (1976). Moreover, in light of the risk to decedent's life resulting from the City's failure to obey the clear mandates of the statute, the City can assert no appropriate interest to justify its failure to comply. *Cf. e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

Fourteenth Amendment liberty interests are created by state law only when the state statute creates specific substantive predicates that mandate action and an outcome favorable to the protected class if those predicates are followed. *See, Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983). As will appear below, the Texas Hazard Communication Act fully meets these requirements.

As discussed in point III A, *supra*, this Court has held that state created property interests, including property interests in employment with a public entity, give rise to procedural due process protections. *E.g., Board of Regents v. Roth*, 408 U.S. 564; *Perry v. Sinderman*, 408 U.S. 593 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The Court has also held that state created "liberty" interests relating to public employment similarly give rise to constitutional procedural due process protection. *E.g., Board of Regents v. Roth*, 408 U.S. 564.

In addition, in numerous cases this Court has extended procedural due process protections to other state created liberty interests. *E.g., Board of Pardons v. Allen*, 482 U.S. 369 (1987) (state law stating that parole "shall" be granted under certain conditions creates liberty interest); *Mills v. Rogers*, 457 U.S. 291 (1982) (mental patients' state statutory right to refuse anti-psychotic drugs creates a liberty interest); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (liberty interest created by statute providing that prisoners may not be transferred to mental hospitals except on certain conditions); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (liberty interest created by state parole statute); *Hewitt v. Helms*, 459 U.S. at 472-476 (1983) (mandatory state statutes and regulations create a liberty interest in remaining in prison's general population as opposed to segregation), *Board of Regents v. Roth*, 408 U.S. 564 (liberty interest in freedom from false and stigmatizing charges that affect a person's future employment opportunities); *Codd v. Velger*, 429 U.S 624 (1977) (same).

In carefully constrained circumstances, substantive interests that are created or mandated by state statutes, such as the Texas Hazard Communication Act, also give rise to substantive due process protections under the Fourteenth Amendment. The Court has not squarely addressed the issue. *See DeShaney*, 489 U.S. at 195 n.2; *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982). However, the Court has made it plain that the core of substantive due process protection — freedom from unwarranted arbitrary and capricious government action that seriously affects one's liberty — comes into play upon state recognition of such a liberty interest. *See Daniels*, 474

U.S. 327. *See also, Superintendent v. Hill*, 472 U.S. 445 (1985) (prison segregation decisions must be based on "some evidence"). Analytically, when the state creates a liberty or property interest, there is no reason then to impose on state actors only procedural due process obligations.

State statutory law would no more be constitutionalized under Section 1983, by recognizing substantive due process protection of such state created interests, than has federal statutory law been constitutionalized under the Fourteenth Amendment by allowing federal statutory rights to be asserted under Section 1983. *See, e.g., Golden State Transit Corp.*, 493 U.S. 103 (1989).

It is true that "mere violation of a state statute does not infringe the federal Constitution." *Snowden v. Hughes*, 321 U.S. 1, 11 (1944). However, as the procedural due process decisions make abundantly clear, state statutes and regulations do create substantive interests that are subject to constitutional protection. Under numerous other decisions of this Court, statutorily created interests are also subject to substantive constitutional protections, such as those of the First Amendment, Fourth Amendment, Fifth Amendment, and the Equal Protection clause.

"Substantive due process" also constrains state action that violates state created liberty interests. This follows from this Court's appreciation that "a state creates a protected liberty interest by placing substantive limitations on official discretion." *Olin v. Wakinekona*, 461 U.S. 238, 249 (1983). *See Superintendent v. Hill*, 472 U.S. 445 (1985).

This Court has assumed, in a setting analogous to public employment, the existence of a student's substantive due process right to be free from arbitrary dismissal from a State University's medical education program. *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). In a concurring opinion in *Ewing*, Justice Powell, stating that it was unnecessary for the Court to make that assumption, cautioned that:

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, [citation

> omitted] substantive due process rights are created only by the Constitution.
>
> 474 U.S. at 229.

Justice's Powell's analysis, however, correctly acknowledged that a state created property interest could, in an employment setting, give rise to substantive due process protections. *Id.* at 230, citing *Harrah Independent School District v. Martin*, 440 U.S. 194 (1978).

Moreover, Justice Powell, speaking for the Court in *Mills v. Rogers*, 457 U.S. 291 (1982), recognized:

> As a practical matter, both the substantive and procedural [due process] issues are intertwined with questions of state law. In theory a court might be able to define the scope of a patient's federally protected liberty interest without reference to state law. Having done so, it might then proceed to adjudicate the procedural protection required by the Due Process Clause for the federally protected interest alone. . . . For purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution. . . . . If so, the broader state protections would actually define the substantive rights possessed by a person living within that State.
>
> *Id.* at 300 (citations and footnote omitted).

Virtually all entitlements to liberty and property are created by the states. That is why, after all, the first words of the Fourteenth Amendment are: "*All persons born or naturalized in the United States are citizens of the United States and of the State wherein they reside.*" (emphasis added). *See also, Connecticut v. Doehr*, ___ U.S. ___, 59 U.S.L.W. 4587 (June 6, 1991) (No. 90-143).

The substantive and procedural due process components frequently are more than intertwined. *E.g., Bearden v. Georgia*, 461 U.S. 660, 666 n.7 (1983); *Douglas v. Buder*, 412 U.S. 430, 454 (1973); *Ellard v. Alabama Board of Pardons and Paroles*, 824 F.2d 937, 945-946 (11th Cir. 1987). *See Superintendent v. Hill*, 472 U.S. 445 (1985). Especially in a case like the instant one, in which the state created substantive interest is protection of life and enhancement of personal security, through imposition of express obligations to train, warn and properly equip a worker, the substantive and procedural due process components merge. *See, e.g., Meador v. Cabinet for Human Resources*, 902 F.2d. 474 (6th Cir. 1990) (state created entitlement to personal security of children placed in state regulated foster homes); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) *cert. denied*, 489 U.S. 1065 (same); *Anderson v. City of New York*, 611 F.Supp. 481, 488-491 (S.D.N.Y.) (state created liberty interest in reputation and privacy).

Even assuming the absence of a substantive due process interest arising directly under the Constitution, therefore, the State of Texas has created a liberty interest that is entitled to full due process protection under Section 1983, in that the Texas Hazard Communication Act has created specific substantive predicates that mandate action and an outcome favorable to decedent if those predicates are followed. *See, Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Hewitt v. Helms*, 459 U.S. 460, 472-476 (1983).

The Texas Hazard Communication Act is mandatory in terms of the obligations imposed on municipal employers. That statute also identifies the class of persons (including decedent) protected and the class of persons (including the City) obligated to provide protection. Finally, it sets forth substantive predicates that mandate elimination, or at least amelioration, of the risks to decedent's life and personal security.

The statute protects workers from hazardous chemicals, such as sewer gas. (Br. App. at A-4-5, Section 2, Texas Health and Safety Code ("H.&S.C.") Section 502.002 (Vernon, 1991), Br. App. at A-6, Section 3(9), H.&S.C. Section 502.003(12)). Its protection extends to people working for municipal employers. (Br. App. A-6, Section 3(13), H.&S.C. Section 502.003(16)). It mandates that "an employer *shall*" "educate," "train" and "instruct" employees, especially "new"

employees concerning the hazardous chemicals they will encounter. (Br. App. at A-11 Section 10(a), *see* H.&S.C. Section 502.010(a), (c) and (d)) (emphasis added). It also provides that:

> new or newly assigned employees *shall* be provided training *before* working with or in a work area containing hazardous chemicals.
>
> (Br. App. at A-11, Section 10(a), H.&S.C. Section 502.010(d)) (emphasis added).

The Statute also provides that the employer's training program must include:

> . . . the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees; protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and general safety instructions on the handling, cleanup procedures, and disposal of hazardous chemicals.
>
> (Br. App. at A-11, Section 10(b), H.&S.C. Section 502.010(f)(2) and (4)).

Significantly affirmative rights are provided to the employees under the Statute:

> Employees who may be exposed to hazardous chemicals *shall* be informed of the exposure. . . . In addition, employees *shall* receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. *These rights are guaranteed* on the effective date of this Act.
>
> (Br. App. at A-14, Section 15(a), H.&S.C. Section 502.013(b)) (emphasis added).

In addition, the Statute requires employers to post notice of the statutory requirements. (Br. App. at A-8, Section 5, H.&S.C. Section 502.013(a)). By regulation, that notice must specify the protections stated above. (Br. App. at A-21(a), Texas Administrative Code Section 295.5 (West)). Employees are also protected from retaliation by their employers for asserting rights under the Statute. (Br. App. at A-14(b), Section 15(a), H.&S.C. Section 502.013(c)).

Given the nature of the risks and injuries to its employees, including decedent, that have resulted from the City's failure to comply with its mandatory obligations under the statute, a post-deprivation remedy could not satisfy the City's procedural or substantive due process obligations. Moreover, as a liberty interest is engaged, the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984) is not involved. *See Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100 (1990).

Finally, given the terms of the Texas Hazard Communication Act, even applying a procedural due process analysis, only one outcome is possible upon balancing: (1) the private interest at stake (decedent's life and personal security), (2) the risk of unwarranted deprivation of that interest through failure to comply with the statute, and (3) the City's interest, including the fiscal and administrative burdens of compliance with the statutory procedures. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). *Hewitt v. Helms*, 459 U.S. 460 (1983). Decedent's private interest in his life and personal security were as precious as they come, and given the State of Texas' declared legislative policy, the City can assert no legitimate government interest in non-compliance.

To the extent that the Court may be concerned that extending procedural or substantive due process protection to interests such as those created by the Texas Hazard Communication Act may unduly expand the Due Process Clause or Section 1983, sufficient limitation is provided by rigorous application of the *Thompson* mandatory substantive predicates requirement and the *Mathews* balancing of factors required for a due process violation.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded to that court with instructions to direct the United States District Court for the Western District of Texas to vacate its Judgment of dismissal. Alternatively the Court should instruct the Court of Appeals

to decide or have the district court decide, in the first instance, the question whether Collins has properly claimed due process rights protected by the Fourteenth Amendment.

June 18, 1991

Respectfully submitted,

SANFORD JAY ROSEN
Attorney of Record
for Petitioner

Constitutional Provision and Statutes

Fourteenth Amendment to the Constitution of the United States

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Federal Rules of Civil Procedure, Rule 12. (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party

under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Texas
Hazard
Communication
Act and Rules

(seal)

TEXAS DEPARTMENT OF HEALTH
AUSTIN, TEXAS

HAZARD COMMUNICATION ACT AND RULES

Enacted by the 69th Legislature, 1985. Amended 1987. Codified in *Vernon's Texas Civil Statutes* as Title 83, Article 5182b. Rules adopted by the Board of Health were published in the *Texas Register* as §§295.1-295.8 in 10 *TexReg* 4889-4890, 11 *TexReg* 850-852, 4159-4161 (1986); and §§295.2 and 295.9 in 12 *TexReg 3551-3553 (1987).*

Note:

New organizational names within the Texas Department of Health are used in this pamphlet. "Occupational Health Program" has been changed to "Hazard Communication Branch,

Division of Occupational Safety and Health". These changes have not yet been formally made to the Board of Health rules.

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Title 83, Art. 5182b.
HAZARD COMMUNICATION ACT

AN ACT

Short Title

Sec. 1. This article may be cited as the "Hazard Communication Act."

Declaration of Purpose

Sec. 2. The legislature finds that the health and safety of persons living and working in the State of Texas may be improved by providing access to information regarding hazardous chemicals to which they may be exposed either during their normal employment activities, during emergency situations, or as a result of proximity to the manufacture or use of those chemicals. The legislature also finds that many employers in the State of Texas have already established suitable information programs for their employees and that access to that information is scheduled to be required of all manufacturing employers by November 1985 under the federal Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard. It is the intent and purpose of this Act to assure that, in the event that the OSHA standard does not take effect or remain in effect, accessibility to information regarding hazardous chemicals be provided to employees who may be exposed to those chemicals in manufacturing employer workplaces. It is also the intent and purpose of this Act that the information be provided to employees who may be exposed to hazardous chemicals in

nonmanufacturing employer workplaces, to emergency service organization responsible for dealing with chemical hazards during emergency situations, and to the commissioner of health to make the information available to the general public through specific procedures.

Definitions

Sec. 3. In this Act:

(1) "Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name that will clearly identify the chemical for the purpose of conducting a hazard evaluation.

(2) "Common name" means any designation of identification such as code name, code number, trade name, brand name, or generic name used to identify a chemical other than by its chemical name.

(3) "Chemical manufacturer" means an employer in Standard Industrial Classification (SIC) Codes 20 through 39 with a workplace where chemicals are produced for use or distribution.

(4) "Designated representative" means the individual or organization to whom an employee gives written authorization to exercise the employee's rights under this Act. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

(5) "Distributor" means any business, other than a chemical manufacturer or importer, that supplies hazardous chemicals to other distributors or to purchasers.

(6) "Employee" means any person who may be or may have been exposed to hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies. Office workers, ground maintenance workers, security personnel, or nonresident management are not

included unless their job performance routinely involves potential exposure to hazardous chemicals. The term "employee" includes persons working for the State of Texas and its political subdivisions, as well as members of volunteer emergency service organizations.

(7) "Expose" or "exposure" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry, including inhalation, ingestion, skin contact, or absorption, and includes potential, possible, or accidental exposure.

(8) "Fire chief" means the elected or paid administrative head of a fire department as defined in Chapter 125, Acts of the 45th Legislature, Regular Session, 1937 (Article 6243e, Vernon's Texas Civil Statutes).

(9) "Hazardous chemical" means any element, chemical compound, or mixture of elements or compounds that is a physical hazard or health hazard as defined by the OSHA standard in 29 CFR Section 1910.1200(c), or a hazardous substance as defined by the OSHA standard in 29 CFR Section 1910.1200(d)(3).

(10) "Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

(11) "Manufacturing employer" means an employer with a workplace classified in Standard Industrial Classification (SIC) Codes 20 through 39 who manufacturers (sic) or uses a hazardous chemical.

(12) "Material safety data sheet" ("MSDS") means a document containing chemical hazard and safe handling information, provided that after November 25, 1985, "MSDS" means a document prepared in accordance with the requirements of the OSHA standard for that document.

(13) "Nonmanufacturing employer" or "employer" means an employer with a workplace in Standard Industrial

Classification (SIC) Codes 46 through 49 (pipelines, transportation services, communications and electric, gas, and sanitary services), 51 (wholesale trade, nondurable goods), 75 (automotive repair, services, and garages), 76 (miscellaneous repair services), 80 (health services), 82 (educational services), and 84 (museums, art galleries, botanical, and zoological gardens); the State of Texas and its political subdivisions and all volunteer emergency service organizations. If the OSHA standard does not take effect or remain in effect, "employer" also includes manufacturing employer.

(14) "OSHA standard" means the Hazard Communication Standard issued by the Occupational Safety and Health Administration in 48 Federal Register 53280 et seq. (November 25, 1983), to be codified under Title 29 of the Code of Federal Regulations (CFR) Section 1910.1200.

(15) "Commissioner" means the commissioner of health.

(16) "Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used and where employees are present.

(17) "Workplace" means an establishment at one geographical location containing one or more work areas.

(18) "Workplace chemical list" means the list of hazardous chemicals developed under Section 6 of this Act or Section 1910.1200(e)(i) of the OSHA standard.

(19) "Board" means the Texas Board of Health.

(20) "Department" means the Texas Department of Health.

Relationship To OSHA Standard

Sec. 4(a) Manufacturing employers and distributors that are regulated by and complying with the provisions of the OSHA standard are exempt from this Act except for Sections 6(d), 6(e), 7(a), 7(d), 9, 13(c), 13(d), 13(e), and 15 of this Act. Manufacturing employers and distributors are subject to

this Act if the OSHA standard does not take effect or remain in effect.

(b) Nonmanufacturing employers that adopt and comply with the provisions of the OSHA standard may be certified by the commissioner as being in compliance with this Act except for Sections 6(d), 6(e), 7(a), 7(d), 9, 13(c), 13(d), 13(e), and 15 of this Act. This certification shall be done annually.

Notice to Employees

Sec. 5. Employers shall post adequate notice, at locations where notices are normally posted, informing employees about their rights under this Act. In the absence of a notice prepared by the commissioner under Section 14 of this Act, an employer notice shall be posted.

Workplace Chemical List

Sec. 6. (a) Employers shall compile and maintain a workplace chemical list which shall contain the following information for each hazardous chemical normally used or stored in the workplace in excess of 55 gallons or 500 pounds or an amount that the board determines by rules for certain highly toxic or dangerous hazardous chemicals:

(1) the chemical name and the common name used on the MSDS and container label;

(2) the nomenclature used in identifying the chemical name; and

(3) the work area in which the hazardous chemical is normally stored or used.

(b) The workplace chemical list shall be updated as necessary but not less frequently than annually.

(c) The workplace chemical list may be prepared for the workplace as a whole or for each work area, provided that the list is readily available to employees and their representatives. New or newly assigned employees shall be made aware

of the workplace chemical list before working with or in a work area containing hazardous chemicals.

(d) The workplace chemical list shall be provided to the commissioner on the effective date of this Act or, for an employer or manufacturing employer that begins operation after the effective date of this Act, within 60 days after the date on which it begins operation.

(e) The workplace chemical list shall be maintained by the employer or manufacturing employer for 30 years. Complete records shall be sent to the commissioner if the business ceases to operate within the state.

Material Safety Data Sheets

Sec. 7. (a) Chemical manufacturers and distributors shall provide manufacturing and nonmanufacturing purchasers of hazardous chemicals in this state appropriate MSDSs for the hazardous chemicals purchased.

(b) Employers shall maintain the most current MSDS received from manufacturers or distributors for each hazardous chemical purchased. If an MSDS has not been provided by the manufacturer or distributor for chemicals on the workplace chemical list at the time the chemicals are received at the workplace, the employer shall request one in writing from the manufacturer or the distributor in a timely manner.

(c) Material safety data sheets shall be readily available on request, for review by employees or designated representatives.

(d) A copy of an MSDS shall be provided to the commissioner on request. The commissioner shall request an MSDS from an employer or manufacturing employer when an MSDS is requested by a person if that request is based on a review of the employer's or manufacturing employer's workplace chemical list by the person requesting the MSDS.

Labels

Sec. 8. (a) Existing labels on incoming containers of hazardous chemicals may not be removed or defaced.

(b) Employees may not be required to work with a hazardous chemical from an unlabeled container except for a portable container intended for the immediate use of the employee who performs the transfer.

Emergency Information

Sec. 9. (a) Employers or manufacturing employers who normally store a hazardous chemical in an amount in excess of 55 gallons or 500 pounds or in an amount the board determines by rule for certain highly toxic or dangerous hazardous chemicals shall provide to the fire chief of the fire department having jurisdiction over the workplace, in writing, the names and telephone numbers of knowledgeable representatives of the employer or manufacturing employer who can be contacted for further information or contacted in case of an emergency.

(b) Each employer or manufacturing employer shall provide a copy of the workplace chemical list to the fire chief on request. The employer shall notify the fire chief of any significant changes that occur in the workplace chemical list.

(c) The fire chief or his representative, on request, should be permitted to conduct on-site inspections of the chemicals on the workplace chemical list for the sole purpose of preparing fire department activities in case of an emergency.

(d) Employers or manufacturing employers shall provide to the fire chief, on request, a copy of the MSDS for any chemical on the workplace chemical list.

(e) The fire chief shall make the workplace chemical list and MSDSs available to members of the fire department having jurisdiction over the workplace and to other personnel

outside the fire department who are responsible for preplanning emergency activities, but may not otherwise distribute the information without approval of the employer or manufacturing employer.

Employee Education Program

Sec. 10. (a) Every employer shall provide, at least annually, an education and training program for employees using or handling hazardous chemicals. Within 30 days of providing the education and training program, an employer shall report to the commissioner that the program has been provided to the employees. Additional instruction shall be provided when the potential for exposure to hazardous chemicals is altered or when new and significant information is received by the employer concerning the hazards of a chemical. New or newly assigned employees shall be provided training before working with or in a work area containing hazardous chemicals.

(b) The program must include, as appropriate, information on interpreting labels and MSDSs and the relationship between those two methods of hazard communication; the location, acute and chronic effects, and safe handling of hazardous chemicals used by the employees; protective equipment and first aid treatment to be used with respect to the hazardous chemicals used by the employees; and general safety instruction on the handling, cleanup procedures, and disposal of hazardous chemicals. Employers shall keep a record of the dates of training sessions given to employees.

(c) The commissioner, under Section 14 of this Act, shall develop an education and training assistance program to aid those employers who, because of size or other practical considerations, are unable to develop the programs by themselves. The program shall be made available to such an employer on request.

Construction of Act

Sec. 11. The provision of information to an employee does not in any way affect the liability of an employer with regard to the health and safety of an employee or other person exposed to hazardous chemicals, nor does it affect the employer's responsibility to take any action to prevent the occurrence of occupational disease as required under any other provision of law. The provision of information to an employee does not affect any other duty or responsibility of a manufacturer, producer, or formulator to warn ultimate users of a hazardous chemical under any other provision of law.

Powers and Duties of Board

Sec. 12. The board may, in the manner provided by law, adopt rules and administrative procedures reasonably necessary to carry out the purposes of the Act.

Complaints, Investigations, Penalties

Sec. 13. (a) Complaints received in writing from employees or their designated representatives relating to alleged violations of this Act by nonmanufacturing employers shall be investigated in a timely manner by he [sic] commissioner or his designated representative. Complaints from employees or their designated representatives relating to alleged violations by manufacturing employers shall be referred to the federal Occupational Safety and Health Administration by the complainant. However, complaints shall be investigated by the commissioner or his designated representative if the OSHA standard does not take effect or does not remain in effect or if the complaint is based on a requirement under this Act.

(b) Officers or duly designated representatives of the Commissioner, on presentation of appropriate credentials, have the right of entry into any workplace at reasonable times to inspect and investigate complaints.

(c) Employers and manufacturing employers found to be in violation of this Act have 14 days to comply. Employers and manufacturing employers not complying within 14 days following written notification of a violation are subject to an administrative penalty of not more than $500 per violation.

(d) If required under this Act, employers and manufacturing employers who knowingly disclose false information or negligently failed to disclose a hazard are subject to a civil fine of not more than $5,000 per violation. This section does not affect any other right of an employee or any other person to receive compensation for damages under other law.

(e) If required under this Act, employers and manufacturing employers who proximately cause an injury to an individual by knowingly disclosing false hazard information or knowingly failing to disclose hazard information are subject to a criminal fine of not more than $25,000. This section does not affect any other right of an employee or any other person to receive compensation for damages under other law.

Outreach Programs

Sec. 14. (a) The commissioner shall develop and provide to each employer a suitable form of notice providing employees with information regarding their rights under this Act.

(b) As part of the outreach program, the commissioner shall develop an education and training program consisting of instructional materials to assist employers under Section 10 of this Act.

(c) As part of the outreach program, the commissioner shall develop and distribute a supply of informational leaflets on employers' duties, employee rights, the public's ability to obtain information under this Act, the outreach program, and the effects of hazardous chemicals.

(d) The commissioner may contract with a public institution of higher education or other public or private organizations to develop and implement the outreach program.

(e) The commissioner shall publicize the availability of information to answer inquiries from employees, employers, or the public in this state concerning the effects of hazardous chemicals.

(f) In cooperation with the commissioner, an employer may provide an outreach program in the community.

Employee Rights

Sec. 15. (a) Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and MSDSs for the hazardous chemicals. Employees, on request, shall be provided a copy of a specific MSDS with trade secret information, if any, deleted. In addition, employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the effective date of this Act.

(b) An employer or manufacturing employer may not discharge, cause to be discharged, otherwise discipline, or in any manner discriminate against an employee because the employee has filed a complaint, assisted an inspector of the department who may make or is making an inspection under Section 13 of this Act, instituted or caused to be instituted any proceeding under or related to this Act, testified or is about to testify in such a proceeding, or exercised any rights afforded under this Act on behalf of the employee or on behalf of others. Pay, position, seniority, or other benefits may not be lost as the result of the exercise of any right provided by this Act.

(c) Any waiver by an employee of the benefits or requirements of this Act is against public policy and is null and void. Any employer's or manufacturing employer's request or requirement that an employee waive any rights under this Act as a condition of employment is a violation of this Act.

Protection of Trade Secrets

Sec. 16. (a) An employer who believes that all or any part of the information required under Section 6, 9(b), or 9(d) is a trade secret may withhold the information, provided that:

(1) material safety data sheets are available to employees in the area where they work;

(2) hazard information on the trade secret chemicals, or an MSDS with trade secret information deleted, is provided to the fire chief and the commissioner, on request;

(3) all relevant information is provided to a physician diagnosing and treating a person exposed to the chemical, under requirements stated in the OSHA standard in 29 CFR Section 1910.1200(i)(2); and

(4) the employer can substantiate the trade secret claim. For purposes of this Act, the requirements in the OSHA standard for physicians treating employees shall apply to physicians treating persons.

(b) The commissioner, on his own initiative or on the request of an employee, the employee's designated representative, a fire chief, or a person who made a request under Section 7(d) of this Act, may request any or all of the data substantiating the trade secret claim to determine whether the claim made under Subsection (a) of this section is valid. When making a determination of a trade secret claim under this subsection, the commissioner shall conduct a reasonable search of available literature to determine if the hazard information is accurate. If the commissioner, based on his review of the health and safety information made available by the employer and other available information, has determined that the MSDS does not reflect a prudent assessment of the scientific evidence regarding hazards, then the commissioner shall add an addendum to the MSDS over his signature reflecting his opinion of a prudent assessment of the scientific evidence. The assessment shall be complete within 90 days of the commissioner's receipt of the information or data substantiating the trade secret claim. The commissioner shall protect

from disclosure any or all information coming into his possession when the information is marked by the employer as confidential, and shall return all information so marked to the employer at the conclusion of a final determination.

(c) The employer has 30 days after notification by the commissioner that a trade secret claim is not valid to petition for judicial review. Judicial review shall be by trial de novo in a district court of Travis County.

Exemptions

Sec. 17. (a) Notwithstanding any language to the contrary, the provisions of this Act do not apply to chemicals in the following categories:

(1) any article that is formed to a specific shape or design during manufacture, that has end-use functions dependent in whole or in part on its shape or design during end use, and that does not release or otherwise result in exposure to a hazardous chemical under normal conditions of use;

(2) products intended for personal consumption by employees in the workplace;

(3) retail food sale establishments and all other retail trade establishments, exclusive of processing and repair areas;

(4) any food, food additive, color additive, drug, or cosmetic as those terms are defined in the Food and Drug Act (21 U.S.C. 201 et seq.), or distilled spirits, wines, or malt beverages as those terms are defined in the federal Alcohol Administration Act (27 U.S.C. 201 et seq.);

(5) a laboratory under the direct supervision or guidance of a technically qualified individual, provided that;

(A) labels on containers of incoming chemicals shall not be removed or defaced;

(B) material safety data sheets received shall be maintained and made accessible to employees and students;

(C) the provisions of Sections 9 and 10 of this Act are met; and

(D) the laboratory is not used primarily to produce hazardous chemicals in bulk for commercial purposes;

(6) products labeled pursuant to the federal Insecticide, Fungicide, and Rodenticide Act;

(7) hazardous waste regulated pursuant to the federal Resource Conservation and Recovery Act; and

(8) radioactive waste.

(b) No provision of this Act, except Sections 9(a) and 10, applies to a workplace where a hazardous chemical is received in a sealed package and is subsequently sold or transferred in that package if the seal remains intact while the chemical is in the workplace and if the chemical does not remain in the workplace more than five working days.

Severability

Sec. 18. The provisions of this Act are severable, and if any phrase, clause, sentence, or provision of this Act, or the application of any phrase, clause, sentence, or provision to any person, business entity, or circumstances, shall be held invalid, the remainder of this Act, and the application of such provision or provisions to any person, business entity, or circumstances other than those to which it was held invalid, shall not be affected thereby.

Fees

Sec. 19. The board may authorize the collection of fees from manufacturing and nonmanufacturing employers for the filing of workplace chemical lists required by this Act or for other community right-to-know purposes within the jurisdiction of the Texas Department of Health. The fees shall be paid annually and may not exceed $50 for each required submission.

Passed as HB1112, 69th Leg., eff. Jan. 1, 1986. Amended by HB2140, 70th Leg., 1987.

Title of Act:

An act relating to providing employees with access to information relating to hazardous chemicals to which they may be exposed during their employment, to providing hazard information to emergency service personnel and the commissioner of health, and to providing persons with a mechanism to gain access to information relating to hazardous chemicals; providing penalties. Acts 1985, 69th Leg. 1037, ch. 194.

RULES ADOPTED BY THE TEXAS BOARD OF HEALTH UNDER THE HAZARD COMMUNICATION ACT, ARTICLE, 5182b, SEC. 12.

§ 295.1. Purpose and Scope.

(a) The purpose of these rules is to provide employees and the public with access to information relating to hazardous chemicals to which they may be exposed during their employment, to provide hazard information to emergency service personnel and the Commissioner of Health, and to provide persons with a mechanism to gain access to information relating to hazardous chemicals.

(b) In order to avoid confusion among employers and the public, the Board shall implement the Hazard Communication Act, Texas Civil Statutes, Article 5182b, compatibly with the Hazard Communication Standard (OSHA Standard) of the ~~Un~~ited States Department of Labor, Occupational Safety and Health Administration, 29 CFR 1910.1200.

§ 295.2. Definitions.

In addition to the statutory definitions, the following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

Act – The Hazard Communication Act, Texas Civil Statutes, Article 5182b.

Appropriate hazard warning – Any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the health and physical hazards of the chemical(s) in the container(s).

Board – The Texas Board of Health.

Commissioner – The Texas Commissioner of Health.

Department – The Texas Department of Health.

Health hazard – A chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes.

Identity – Any chemical or common name which is indicated on the material safety data sheet (MSDS) for this chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

Label – Any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals, which includes a common name referenceable to a material safety data sheet and workplace chemical list.

Physical hazard – A chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

Temporary workplace – A stationary workplace that is inhabited less than 20 hours per week and which contains fewer than 25 items on the workplace chemical list. A temporary workplace may be considered to be a work area of the

headquarters workplace from which employees are routinely dispatched. Temporary workplaces may include pumping stations, switching stations, electrical substations, utility structures, and the like, provided that the requirements of the Texas Hazard Communication Act, Texas Civil Statutes, Article 5182b, §§ 6, 7, 9, 10, and 15, and (sic) are met and employees have ready access to the appropriate workplace chemical lists at the headquarters and the temporary workplace.

Work area – A room or defined space in a workplace where hazardous chemicals are produced or used and where employees are present. A temporary workplace may be considered a work area.

Workplace – An establishment at one geographical location containing one or more work areas. Normally this would be a building or other structure, but it could be a complex of buildings if the work activities and hazardous chemicals within these buildings are similar.

§ 295.3 Responsibility for implementation of program.

The Commissioner's responsibilities under the Act are carried out through the Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the Commissioner, to:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756.

§ 295.4 Labeling

(a) If the OSHA Hazard Communication Standard does not remain in effect, the chemical manufacturer, formulator, importer, or distributor of hazardous chemicals shall ensure

that each container leaving or kept in the workplace is labeled, tagged, or marked with the following information:

(1) Identity of the hazardous chemical(s);

(2) Appropriate hazard warnings; and

(3) Name and address of the chemical manufacturer, importer, or other responsible party.

(b) Employers must label new or existing stocks of hazardous chemicals with the following information, if such stocks are not already appropriately labeled:

(1) Identity of the hazardous chemical(s); and

(2) Appropriate hazard warnings.

(c) Labeling of pipelines, valves and other stationary conveyances is not required, provided that employees have ready access to documents or instruments to determine the contents of these conveyances at any time.

§ 295.5 Posting of workplace notice.

(a) Nonmanufacturing employers covered by the Act must keep posted a workplace notice specified in this rule. The wording of the required workplace notice may be changed by the Commissioner of Health as needed. The wording of the workplace notice is as follows:

NOTICE TO EMPLOYEES

THE TEXAS HAZARD COMMUNICATION ACT OF 1985, TEXAS CIVIL STATUTES, ARTICLE 5182b, REQUIRES CERTAIN EMPLOYERS TO

provide employees, local fire departments, the Texas Department of Health, and other interested persons with specific information on the hazards of chemicals in use. As required by law, your employer must provide you with certain information and training, starting January 1, 1986. A brief summary of the law follows.

1. Employers must develop a list of hazardous chemicals used or stored in the workplace, each in excess of 55

gallons or 500 pounds. Smaller quantities may be reported. The list must be sent to the Texas Department of Health at least annually, to be made available to the general public on request.

2. Employees who may be exposed to hazardous chemicals shall be informed of the exposure by the employer and shall have ready access to the workplace chemical list and to the most current material safety data sheets, which detail physical and health hazards and other pertinent information. The list must state which chemicals are present in each work area.

3. Employees shall receive training by the employer on the hazards of the chemicals and on measures they can take to protect themselves from those hazards, and shall be provided with appropriate personal protective equipment. This training shall be provided at least annually and must be reported by the nonmanufacturing employer to the Texas Department of Health within 30 days of completion.

4. Employees shall not be required to work with hazardous chemicals from unlabeled containers, except portable containers for immediate use, the contents of which are known to the user.

5. Employers must provide the names and telephone numbers of knowledgeable company representatives to the local fire department, as well as other information if the fire department requests it.

6. The following chemicals are exempted from coverage by this act: articles that do not normally release hazardous chemicals, food, cosmetics, pesticides for use (but not pesticide formulation), hazardous waste, and some other materials. Most of these are covered by other acts. Manufacturers are exempt from some provisions of the State law since they are covered under similar rules adopted by the Federal Occupational Safety and Health Administration (OSHA).

7. Employees may file complaints with the Texas Department of Health, and may not be discharged or discriminated against in any manner for the exercise of any rights provided by this act. Employees and citizens may make written requests to the Texas Department of Health to require listing of small quantities of certain highly hazardous chemicals.

EMPLOYERS MAY BE SUBJECT TO ADMINISTRATIVE PENALTIES AND CIVIL OR CRIMINAL FINES RANGING FROM $500 TO $25,000 FOR VIOLATIONS OF THIS ACT.

Further information may be obtained from:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756
phone: (512) 458-7410

(b) The workplace notice must measure at least 8½ by 11 inches and must be typed, typeset, or use mechanically produced lettering that is clearly legible. The letters must not be smaller than 12 characters per inch. The words 'NOTICE TO EMPLOYEES' must be in bold capital letters at least ½ inch high. Other words spelled in capital letters must be reproduced in capital letters. The notice, as specified, must be produced or obtained by each employer at his own expense until further notice by the Commissioner.

§ 295.6. Compliance deadlines.

(a) Manufacturing and nonmanufacturing employers covered by the Act or specified parts of the Act must send to the Hazard Communication Branch annually an up-to-date workplace chemical list for each of their workplaces in Texas, as specified in § 2, Declaration of Purpose, and § 6, Workplace Chemical List, of the Act. These lists shall be maintained in a public file operated by the Hazard Communication Branch.

(b) Complete workplace chemical lists must be sent to the Department annually, to be postmarked no later than as follows:

(1) manufacturers (Standard Industrial Classification Codes 20-39) – June 30, 1986, and each year thereafter:

(2) nonmanufacturers (Standard Industrial Classification Codes 46-49, 51, 75, 76, 80, 82, 84 state and local government(s) – December 31, 1986, and each year thereafter.

(c) When new chemicals are acquired during the year following the deadline, an addendum to the complete workplace chemical list or a new complete list must also be sent to the Department and must be kept by the employer for 30 years like the annual list.

§ 295.7 Training

A department booklet outlining a training program shall be available by January 1, 1987 at a reasonable price. Other informational materials may be published and sold by the Department at a reasonable price.

§ 295.8 Assessment of Administrative Penalties.

(a) Inspections may be conducted by the Commissioner or his designated representative to determine if persons are in violation of the Hazard Communication Act, Texas Civil Statutes, Article 5182b, or rules adopted by the Board of Health to enforce the Act, §§ 295.1-295.7 of this title (relating to Purpose and Scope; Definitions; Responsibility for Implementation of Program; Labelling; Posting of Workplace Notice; Compliance Deadlines; and Training). (See 11 *TexReg*. 850 and 10 *TexReg*. 4889.) Persons found to be in violation will be notified in writing of the violation.

(b) Inspections are not necessary to confirm violations in all instances. Failure to annually file with the Department the required workplace chemical list and addenda or, for non-

manufacturing employers only, to file the required notice of training will be considered violations of the Act that do not necessarily require an inspection. Other violations may be confirmed by the Department through correspondence with authorized company officials and may not warrant an inspection.

(c) Persons found to be in violation of the Act are subject to administrative penalties authorized by the Act, § 13(c). Each violation will be assessed as a separate penalty. The total penalty will be the sum of all individual violation penalties.

(d) A person notified in writing of a violation must do one of the following within 14 days: correct the violation, pay an administrative penalty, or request a hearing. A written response electing one of these actions must be received by the Chief, Hazard Communication Branch, on or before the 15th day following the receipt of the written notification of violations. A request for a hearing must specify the points of disagreement and relief sought. Hearings shall be held in accordance with §§ 1.21-1.33 of this title (relating to Formal Hearing Procedures).

(e) Penalties will be due on the 15th day following the date that a written notification of violation is received by the person, unless the Hazard Communication Branch receives an acceptable written response that each violation has been abated or that a hearing has been requested. The written response must list separately each violation and must be signed by a duly authorized company official. An inappropriate or unacceptable response will not alleviate the necessity of paying the penalty when due.

(f) Followup inspections may be made to confirm the status of abatement of violations. Any violation found on such followup inspection will be subject to an additional administrative penalty. If the first 14-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.

(g) The amount of penalty per violation will be based on the seriousness of the violation.

(h) The degree of seriousness of each violation will be classified in one of three levels:

(1) A minor violation, which is a minimal threat to employees or the public and/or temporary inability to fully comply.

(2) A serious violation, which is a threat or hazard to employees or the public.

(3) A critical violation, which has caused, or is likely to cause harm to employees or the public.

(i) Penalties will be charged based on the following schedule:

Seriousness of Violation	First Occurrence 1	Second Occurrence 2	Subsequent Occurrence 3
Minor	$ 50	$100	$250
Serious*	$100	$250	$500
Critical*	$300	$400	$500

Failure to correct serious or critical violations may be considered for additional civil or criminal penalties.

(j) Individual violations may be reduced or enhanced based on consideration of the history of previous violations, good faith efforts made to correct violations promptly, and on any other considerations that justice may require. A maximum reduction or enhancement of 50% per individual violation may be considered, based on the facts presented to the Department.

(k) The following are examples of violation seriousness categories and are neither exhaustive nor controlling:

(1) Minor Violation – Level 1.

(A) Failure to post the worker notice on one of five bulletin boards.

(B) Failure to list a hazardous chemical which was not known to be a significant hazard by the employer or manufacturing employer.

(C) Failure to adequately label a hazardous material that was obtained before the Act went into effect.

(D) Failure to send an addendum to the workplace chemical list to the Texas Department of Health.

(E) Inadvertent failure of a manufacturer or distributor to provide an up-to-date material safety data sheet to a school district or other employer covered by the Act.

(2) Serious Violation – Level II.

(A) Failure to inform the local fire department of appropriate contact persons at the company.

(B) Failure to train new employees on the hazards of their jobs.

(C) Failure to provide employees a warning and information on hazardous chemicals being used in the workplace by a contractor, with employees subsequently complaining of irritation caused by vapors.

(E) Failure to train and protect office workers exposed to ammonia from a "blueline" machine.

(3) Critical Violation – Level III.

(A) Refusal to provide hazard information to an employee on request.

(B) Failure to initiate a training program.

(C) Failure to provide requested information to the local fire department.

(D) Failure to provide information on a hazardous chemical to a health professional for diagnosis or treatment of a patient.

(E) Failure to keep a file of material safety data sheets on hazardous chemicals normally present in the workplace.

§ 295.9 Fees for Workplace Chemical Lists

(a) The department shall charge a separate fee for each complete workplace chemical list or other chemical list that is required to be submitted by manufacturing and nonmanufacturing employers to the department. For the purpose of minimizing fees, consolidated filings may be made under the following conditions.

(1) Temporary workplaces, as defined in § 295.2 of this title (relating to Definitions) may be considered work areas within a headquarters workplace, but it is the responsibility of the manufacturing or nonmanufacturing employers to justify such combined reporting in writing at the time that it is submitted.

(2) If an employer has one or more workplaces, each with fewer than 25 hazardous chemicals, those multiple workplaces may be consolidated in one submission, either with one workplace having 2 or more items or with any number of workplaces, each having fewer than 25 items on the workplace chemical list. A separate cover sheet and list must be included for each workplace. If the workplace chemical list contains 25 or more items before consolidation, it may not be consolidated with other such workplaces.

(b) Each list or consolidated filing must be accompanied by a fee, except as provided in subsection (h) of this section, and must be received before the deadline given in § 295.6 of this title (relating to Compliance Deadlines). Multiple submission requiring more than one fee from one employer may be included in the same package, provided that each submission is clearly separated from the other, there is a over sheet and list for each headquarters or multiple workplace, and the total fee payment is included. Cash payments are not acceptable. Fees must be paid by check or money order to the Texas Department of Health and must be addressed to: Hazard Communication Branch, Division of Occupational Safety and Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(c) Workplaces subject to the Texas Hazard Communication Act and the federal Superfund Amendments and Reauthorization Act of 1986 (SARA), Title III, § 311 Public Law 99-499, or other community right-to-know laws, must submit an annual workplace chemical list that adheres to the most stringent reporting requirements of any of the applicable laws and associated rules. Facilities not included in the definitions of manufacturing or non-manufacturing employer, as given in the Texas Hazard Communication Act, § 3, (concerning definitions), but which are subject to SARA, Title III, § 311, must submit to the department a list of chemicals that adheres to the reporting requirements of SARA, Title III, § 311(a)(2) (concerning contents of list). Workplaces subject only to the Texas Hazard Communication Act must adhere to the reporting requirements of that Act and these sections.

(d) Every facility covered by § 312 of SARA, Title III, § 312, must annually submit to the department a Tier I emergency and hazardous chemical inventory, which must be accompanied by a fee for each form. A Tier II inventory, which is more detailed, may be submitted instead of the Tier I inventory, as provided for in the proposed section published in the January 27, 1987 issue of the *Federal Register* (52 FedReg 2844).

(e) The department will charge $25 for each chemical list, properly consolidated filing, or Tier I or II inventory that is submitted, if a workplace has no reportable chemicals under any of the applicable state or federal requirements, no fee need be filed for that workplace. The department shall not charge a fee for any interim addendum to the list that is submitted in compliance with § 295.6(c) of this title (relating to Compliance Deadlines), provided that the employer clearly marks the addendum as such. No receipt will be provided for payment of the fee, but a cancelled check may be considered adequate proof of payment. The department may check its records for verification of payment at the request of any person.

(f) The chemical lists must be typed or mechanically produced on a form by the employer, using the most current format published by the department, which shall generally consist of the following:

(1) a cover sheet, which shall include the employer's name, address, and telephone number; the workplace name, address, and telephone number; the facility representative's name and telephone number; the date; the total fee payment that is enclosed; the total number of hazardous chemicals in the list; an indication of the type of chemical list, such as a state-required workplace chemical list as defined in the Texas Hazard Communication Act, § 6, § 295.2 of this title (relating to Definitions), and § 295.6 of this title (relating to Compliance Deadlines), or a SARA, Title III chemical list (as defined in SARA, Title III, § 311), or other community right-to-know chemical list; and the chemical nomenclature system (Chemical Abstracts Service, International Union of Pure and Applied Chemistry or other) that is generally used in the list;

(2) the chemical list itself which shall consist of the following.

(A) If the state-required workplace chemical list is submitted, it shall contain the common or chemical name of each hazardous material (one per row); the chemical names of all hazardous ingredients in the material; the work areas where the material is used or stored; and (optionally) the hazards and typical quantity of each material.

(B) If the chemical list required under SARA, Title III, § 311, is submitted, it shall contain a list of the hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health (OSHA) Act of 1970 (Public Law 91-596) and the OSHA Hazard Communication Standard. The list shall consist of the chemical or the common name of each such chemical as provided on the material safety data sheet; any hazardous component of each such chemical as provided on the material safety data sheet; the health and physical hazards of the material; and

(optionally) the work area(s) and the typical quantity of each material.

(g) Submission of material safety data sheets (MSDSs) in lieu of the required chemical lists will not be acceptable.

(h) The department may specify methods for the filing of chemical lists on media that are compatible with computing equipment and software used by the department. Employers must then follow such specifications when submitting lists. If the submission by alternate media is acceptable to the department, the fee shall be sent to the department with the list. In the alternative, if the list is submitted by means of communications equipment and is acceptable to the department the fee shall be sent to the department by United States mail within five working days after the submission.

(i) The required chemical list form or format must be made available by the department at the request of employers and manufacturing employers, and may be copied for use or simulated by the employer.

(j) The department may reject chemical lists that do not conform to specifications of which are illegible or unusable by automated equipment. Failure to submit an acceptable workplace chemical list and fee payment by the compliance deadline, given in § 295.6 of this title (relating to Compliance Deadlines), shall be considered a serious violation, subject to the administrative penalties and procedures described in § 295.8 of this title (relating to Assessment of Administrative Penalties).

(k) The department may refund an overpayment to an employer provided that:

(1) the employer provides, in writing, proof of payment, the date(s) on which the workplace chemical list and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have considered an overpayment under the Act and rules in force at the time of the original filing;

(2) the employer requests the refund in writing within one year of the date on which the workplace chemical list and fee were received by the department; and

(3) the employer provides, at the time of the request, a handling fee of $10 per refund, payable by check or money order to the Texas Department of Health.

IMPORTANT NOTE ON RIGHT-TO-KNOW LAWS

Two important federal laws now overlap the Texas-Hazard Communication Act (Texas HCA). They are the "OSHA Hazard Communication Standard" (OSHA HCS or 29 CFR 1910.1200) and the "Superfund Amendments and Reauthorization Act, Title III," known as "SARA, Title III" or the "Emergency Preparedness and Community Right-to-Know Act." Other state and local laws may also affect employers.

The OSHA HCS requires most private employers to provide hazard communication training, information, and protective equipment to their employees. The scope of the OSHA HCS was expanded to the nonmanufacturing sector so that employers must be in compliance by may 23, 1988. OSHA's expanded jurisdiction on "worker right-to-know" pre-empts or supercedes the Texas HCA as it pertains to worker training in private workplaces. See OSHA's final rule on Hazard Communication in the *Federal Register*, August 24, 1987. The Texas Department of Health still has jurisdiction over worker training in all state and local tax-supported institutions, including public schools and universities.

The community right-to-know jurisdiction of the Texas Department of Health has been increased by SARA, Title III and the Legislature. Employers must annually report their chemical inventory and pay a $25 fee to the Department. Employers not previously covered by the Texas HCA will be subject to SARA, Title III, starting May 23, 1988 (the initial deadline for reporting is August 23, 1988). Manufacturers and many nonmanufacturers are already subject to the state's annual reporting requirements. Reports must also be filed

with the local fire department and the "Local Emergency Planning Committee" in each county. Reporting forms and a written guide to compliance are available from the Department on request.

State laws and city ordinances that require reporting of hazardous chemicals continue to be enforced (SARA, Title III does not pre-empt them). However, these laws may be amended to accommodate the federal reporting requirements.

Agricultural employers should be aware of the Texas Agricultural Hazard Communication Act of 1987 (Texas Agricultural Code Annotated, Chap. 125, Vernon's Supp. 1988). This law requires that certain information be given to farm workers and to communities affected by agricultural chemicals. Questions may be directed to the Texas Department of Agriculture, Right-to-Know Program, P.O. Box 12847, Austin, Texas 78711, phone (512) 463-7547.

Further information on the Texas HCA and SARA, Title III may be obtained from:

Hazard Communication Branch
Division of Occupational Safety and Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756
phone: (512) 458-7410

(8)

No. 90-1279

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In The

Supreme Court of the United States

October Term, 1991

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. When a municipal employee suffers workplace personal injuries and files a Section 1983 claim against his employer which alleges no violation of the Bill of Rights, no invidious discrimination, and no infringement of the right of privacy, is abuse of governmental power a necessary aspect of the cause of action?

2. Do state statutes regulating workplace safety create substantive due process rights enforceable under Section 1983?

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No. 90-1279

In The

Supreme Court of the United States

October Term, 1991

MYRA JO COLLINS,

Petitioner,

vs.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Larry Michael Collins, an employee of the City of Harker Heights ("City") Sanitation and Sewer Department, died of asphyxia due to oxygen deprivation while performing his municipal duties. According to Petitioner's complaint, Collins's tragic death was caused by the City's conscious failure to train which amounted to a deliberate indifference to his constitutional rights.

Petitioner filed for workers' compensation benefits. As the claim was uncontested,[1] she began receiving

[1] Because the claim was uncontested by the City, no attorney's fees may be paid out of the claim. TEX. REV. CIV. STAT. ANN. art 8306 § 7d (Vernon Supp. 1991) (repealed effective January 1, 1991).

payments immediately.[2] Thereafter Petitioner filed this Section 1983, 42 U.S.C. § 1983 (Supp. 1991), action against the City.[3] Because neither the Bill of Rights nor an invidious discrimination nor the right of privacy were involved, the district court dismissed the claim, holding that under no set of facts could Petitioner prove the abuse of governmental power that was necessary to state a claim.

Since Petitioner did not and could not properly allege or show an abuse of government power, i.e., that the City

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[2] There being no children, Petitioner receives two-thirds of her husband's average weekly wage at the time of his death for the rest of her life. TEX. REV. CIV. STAT. ANN. art. 8306 § 8a (Vernon Supp. 1991) (repealed effective January 1, 1991). If she remarries, payments will cease after she receives two years of the workers' compensation benefits in a final lump sum payment. TEX. REV. CIV. STAT ANN. art 8306 § 8(b) (Vernon Supp. 1991) (repealed effective January 1, 1991).

[3] In exchange for providing compensation to workers for work-related injuries without regard to fault, the workers' compensation laws preclude an action against an employer for compensatory damages based on negligence. TEX. REV. CIV. STAT. ANN. art. 8306 § 3a (Vernon Supp. 1991) (repealed effective January 1, 1991). A private employer in Texas may not be sued for exemplary damages based on a gross negligence theory unless a death is involved; if a death is involved, the private employer may be sued for gross negligence and exemplary damages. A suit for exemplary damages based on gross negligence is unique to Texas; other states permit such a suit only when the injury is caused by the intentional conduct of the employer. A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 68.13 (1988). A government employer in Texas has sovereign immunity from gross negligence claims and exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 101.024 (Vernon 1986).

acted against the decedent as governed, the Fifth Circuit held that Petitioner had not stated a Section 1983 claim. With a conflict among the circuits, this Court granted certiorari.

SUMMARY OF ARGUMENT

This lawsuit involves a workplace injury. Solely because the City is a government entity, Petitioner attempts to turn an ordinary tort into a generalized due process violation of invasion of bodily sanctity. To transform an ordinary tort, with its state law boundaries and remedies, into a constitutional violation would radically distort the operation of federalism. Thus, when a plaintiff suffers a personal injury and sues a government entity for a deprivation of due process, proof of abuse of governmental authority is an essential element of the claim.

I. Neither the legislative history, decisions of this Court, nor policy considerations support turning Section 1983 into a supplement for workers' compensation in personal injury cases where there is no abuse of governmental power. Section 1983 was adopted against the background of the breakdown of law in the Reconstruction South and the ceding of governmental authority to the Ku Klux Klan as a means of terrorizing the newly freed slaves and their supporters. Thus, as Justice Marshall stated for the Court, the policy considerations underlying Section 1983 were compensation for injury and "prevention of abuses of power." *Robertson v. Wegmann*, 436 U.S. 574, 591 (1978). Were it otherwise, Section 1983 would be turned into a font of tort law at the

expense of the primacy of the states in dealing with injuries whether caused by private or governmental actors. This Court has consistently recognized that considerations of federalism require a clear demarcation between an ordinary tort and a constitutional violation. Abuse of governmental power is an essential ingredient of that demarcation. If Petitioner can get to a jury without a showing of abuse of authority, then the line between constitutional violations and ordinary tort will be hopelessly blurred.

II. State statutes do not create substantive constitutional rights. However obvious the point is, it has eluded Petitioner, who claims that the Texas Hazard Communications Act creates rights which are protected by substantive due process. This novel argument is another direct assault on federalism. It makes constitutional rights turn on the happenstance of residence and ignores the constitutional right of Texans to choose whether to have such a statute as well as the desired level of its enforcement.

ARGUMENT

I. A PERSONAL INJURY CLAIM ASSERTED AS A DUE PROCESS INVASION OF BODILY SECURITY DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 UNLESS THE COMPLAINT PLEADS AN ABUSE OF GOVERNMENT POWER

This is a case about the necessary attributes of a Section 1983 claim when a generalized deprivation of due process (rather than infringement of a specific constitutional guarantee) is involved. In these circumstances,

when a plaintiff's claim is invasion of bodily security, the case may, and likely will, mirror an ordinary personal injury tort. Accordingly, it is essential to have a mechanism for separating a constitutional violation of due process from an accident where relief is the exclusive province of state law.

The differences between the parties and the various amici reflect a deep division over the proper scope of the constitutional tort as a regulator of the employment relationship of millions of public employees and their governmental employers. Petitioner's argument can be simply stated. Whenever an injury is caused by a governmental entity with the requisite degree of fault then there is a constitutional violation and a Section 1983 action lies. Acknowledging that this Court has attempted to separate ordinary governmental torts from Section 1983's constitutional torts, Petitioner argues that the heightened fault standard of *City of Canton v. Harris*, 489 U.S. 378 (1989), is this Court's chosen vehicle for maintaining the boundary. Under Petitioner's theory, if a plaintiff alleges deliberate indifference in an otherwise ordinary tort case against a governmental entity, then he has a constitutional claim for a deprivation of due process; any lesser degree of fault remains an ordinary non-constitutional tort. Nothing in Petitioner's argument turns on the specific facts of Collins's injury; rather it is the City's alleged deliberate indifference to training which creates the constitutional violation. Under Petitioner's argument, had Collins escaped from the sewer with a broken bone or merely a bruise, the City's prior behavior would have been no less culpable (and no less the cause of injury), and therefore the constitutional violation would have been the same.

This argument does maximum damage to both federalism (a concept – even a word – conspicuously absent from Petitioner's Brief) and the Constitution. On the one hand it stigmatizes the City not as a mere tortfeasor, but as a violator of the United States Constitution. On the other hand it trivializes the Constitution by making it do service as a supplement to state tort and workers' compensation remedies when the great concerns of the Constitution – restraining and channelling governmental power – are absent. Section 1983 requires no such result. Indeed, its legislative history, interpretations by this Court, and policy considerations all support the conclusion reached by the Courts below: When a specific constitutional right is not at issue, proof of an abuse of governmental power is an essential ingredient of the constitutional tort.[4]

A. THE ORIGINS OF SECTION 1983

The legislative history of Section 1983 is a testament to the abuse of governmental power in the South. It offers no support for Petitioner's position that Section 1983 applies to every personal injury committed by government so long as the requisite fault can be proven.[5] In light of the legislative history of Section 1983, it is not surprising that Petitioner makes no effort beyond a pair of

[4] Violations of the First, Fourth, Fifth, and Eighth Amendments, invidious discriminations, and infringements of the right of privacy *ipso facto* constitute abuses.

[5] The erroneous premise is that, if a high enough level of fault exists, § 1983 cannot become a font of tort law. Petitioner's Brief at 17.

quotations from the debates to discuss the origins of the statute.

The Ku Klux Klan commenced a "campaign of terror"[6] as the 1870's began. State and local officials in many parts of the South either joined with Klansman or tacitly ceded the coercive powers of government to the Klan. This forms the background for the adoption of Section 1983. *Monroe v. Pape*, 365 U.S. 167, 172-84 (1961); *Monell v. Department of Social Services*, 438 U.S. 658, 665-89 (1978). Nevertheless, it warrants brief repeating because this history speaks so clearly to the issue of abuse of governmental power. A 600 page Senate Report, S.Rep. No. 1, 42d Cong. 1st Sess., cited with frequency during the Congressional debates, describes increasing violence against newly freed slaves and their supporters despite the recent adoption of constitutional amendments and two Force Acts.

On March 23, 1871, President Grant requested emergency legislation to deal with the virtual state of anarchy in the South. Cong. Globe, 42d Cong., 1st Sess. 299 (1871). Less than a month later Congress enacted the requested legislation, Section 1 of which is the current Section 1983. While the debates are "sparse,"[7] the "legislators who proposed the bill saw themselves confronted not with common felonies but with a concerted plan of organized

[6] E. Foner, RECONSTRUCTION 454 (1988).

[7] B. Kritchevsky, *"Or causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L.REV. 1187, 1194 (1988); *Monell*, 436 U.S. at 665.

violence."[8] Representative Shellaberger thought it nothing less than an effort "aimed at the overthrow of all the political rights of four million of the American citizens [in the South], and of all constitutions and laws made in defense of them." Cong. Globe, 42d Cong., 1st Sess. at 519. The plight of newly freed slaves and their supporters in the South was exacerbated by the inaction of state and local governments. As Representative Lowe noted: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."[9] Cong. Globe, 42d Cong., 1st Sess. at 374. The Act of April 20, 1871, aptly titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes", 17 Stat. 13, was hoped to be that proper corrective. Section 1 was directed to governmental lawlessness thereby protecting Fourteenth Amendment rights; the " 'other purpose' [was] suppressing Ku Klux Klan violence," *Monell*, 436 U.S. at 665, and the remaining sections attempted to facilitate that.[10]

There is no doubt either in 1871 or now, 120 years later, that Congress intended Section 1983 to remedy

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[8] *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L.REV. 1133, 1154 (1977).

[9] The remarks of Representative Sheldon, quoted in Petitioner's Brief at 35, are from this part of the debate and go to this point.

[10] J. Randall & D. Donald, THE CIVIL WAR AND RECONSTRUCTION 684 (2d ed. 1969).

abuses of governmental power. Congress was attempting to regulate – and regulate forcefully – the relation of government to its citizens generally. Section 1983, as it implements the Due Process Clause "was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' " *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). If the forces of law enforcement behaved lawlessly or were deliberately indifferent to the rights of citizens, then a federal remedy would be available. When the government brings the force of law to bear on its citizens, it must do so in conformity to federal standards. Thus Petitioner notes, Brief at 31, that the typical personal injury Section 1983 case, from *Monroe v. Pape* to *City of Canton v. Harris*, involves the governance of the municipal police force. By contrast, Section 1983 was never intended nor has it ever been construed by this Court, to be a font of tort law, a supplement to workers' compensation, or a general law regulating workplace safety. To so construe it would ignore its origins, trivialize its essential purposes, and radically distort the nature of our federal system. *Martinez v. California*, 444 U.S. 277, 282 (1980).

B. THIS COURT AND THE LOWER COURTS HAVE RECOGNIZED THAT AN ABUSE OF GOVERNMENTAL POWER IS A NECESSARY ELEMENT OF A SECTION 1983 CASE

Abuse of power is central to the demarcation between ordinary tort and constitutional tort. When a plaintiff alleges a specific constitutional violation, such as

the illegal search and seizure of *Monroe v. Pape*, demarcation is simple even though there is overlap between Section 1983 and the common law. But when a plaintiff alleges an injury based on governmental fault and ties the two with a generalized due process claim, then federalism demands justification for treating a common law tort as a constitutional issue. Only when a government uses and abuses its coercive powers, is that justification present.

Paul v. Davis, 424 U.S. 693 (1976) was the initial attempt to convert an ordinary tort into a constitutional tort. Plaintiff complained that his reputation had been injured by a circular listing him as an active shoplifter when, in fact, he had never been convicted of the crime. Noting that plaintiff's complaint "would appear to state a classic claim for defamation actionable in the courts of virtually every State," 424 U.S. at 697, the Court addressed the implications of finding that a Section 1983 action would lie. This "construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 698. Quite naturally the Court recoiled from such a revolutionary transformation of federalism that would "extend to [everyone] a right to be free of injury whenever the State may be characterized as the tortfeasor. [S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. It would add to the congestion of the federal courts, radically change the nature of the

federal system and fly in the face of prior understandings of the Fourteenth Amendment.

Petitioner herein is again asking this Court to have Section 1983 do service as a constitutional supplement to ordinary tort law. Just as in *Paul v. Davis*, Petitioner "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." *Id.* at 700. Neither freedom of expression nor freedom of conscience were involved. There was no illegal search and seizure, no invasion of the sanctity of the family, no racial or gender discrimination, no decision without a fair hearing. There was an on the job injury, something newspapers report in their communities with regularity. However tragic that loss was, just as in *Paul v. Davis*, there was no constitutional violation. Just a tort.

Given the similarities between the theories of plaintiff in *Paul v. Davis* and the instant case, one would expect more than a single citation to that case in Petitioner's Brief. Mentioned, but not confronted, Petitioner would gut *Paul v. Davis* by the introduction of the deliberate indifference standard of fault. Yet wherever deliberate indifference falls along the continuum of fault, it is less than intentional conduct, and intentional conduct was involved and admitted in *Paul v. Davis*. *Id.* at 717 (Brennan, J. dissenting). Ignoring the need for use of the coercive power of the state (which was not present in *Paul v. Davis* and therefore assists in explaining the Court's hostile reaction to federalizing tort law), Petitioner would reduce *Paul v. Davis* to a historical footnote while massively expanding the range of constitutional tort.

But *Paul v. Davis* and federalism would not be the sole casualties from Petitioner's claim. This Court has consistently recognized the relationship of Section 1983 and abuse of governmental power because, as Justice Marshall noted for the Court, the "policies underlying Section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 574, 591 (1978). More recent cases have been equally explicit about the interrelation of due process and abuse of power. *E.g., DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) ("the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' ") (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("to secure the individual from the arbitrary exercise of the powers of government" and "to prevent governmental power from being 'used for the purposes of oppression' ") (internal citations omitted); *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J. concurring) (to prevent the "affirmative abuse of governmental power"); *see also* H. Blackmun, *Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L.Rev. 1, 3 (1985) (Section 1983 designed to prevent abuse of "coercive state power").

The circuit courts who, with the district courts, see the vast array of Section 1983 claims, have fully understood the need for requiring abuse of power when addressing due process claims. In the five years prior to the instant case, the Fifth Circuit has been called to

address similar issues three separate times. *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985). The Second, Seventh, and District of Columbia Circuits have also addressed the issue and held that, under similar factual circumstances, an employee does not have a cause of action under Section 1983 for on the job injuries. *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *Walker v. Rowe*, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986); *Washington v. District of Columbia*, 802 F.2d 1474 (D.C. Cir. 1986). Only the Eighth Circuit, with its decision in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), has held that abuse of power is irrelevant to an employment injury.[11]

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[11] Petitioner concludes from *Gomez v. Toledo*, 446 U.S. 635 (1980) that all circuits save the Eighth have failed to follow clear and settled law. The unexceptional holding of *Gomez* is that a plaintiff need not anticipate (and therefore negate in advance) an affirmative defense. Petitioner instead relies on the statement that a § 1983 plaintiff need only plead (1) deprivation of a constitutional right (2) by a state actor. 446 U.S. at 640. Petitioner recognizes that, in addition to those two requirements, a plaintiff must also plead the requisite fault, but never takes the next step to distinguish between a violation of a specific constitutional provision (such as the First Amendment claim in *Pickering v. Board of Education*, 391 U.S. 563 (1968)) and an injury claimed to be a deprivation of due process. In the latter (and instant) case the requirement of pleading a deprivation of a constitutional right makes it essential that plaintiff demonstrate at the outset that the case involves "affirmative abuse of power," *Parratt*, 451 U.S. at 549 (Powell, J. concurring). The Fifth Circuit may have been overly technical in stating that abuse of power was an independent aspect of a § 1983 action rather than an essential ingredient of a

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Petitioner views *City of Canton v. Harris* as having changed all the foregoing. From her perspective *City of Canton* holds that a municipality is liable under Section 1983 for all injuries caused by its deliberate indifference to training. *City of Canton* accomplishes no such revolution. Not surprisingly, as its facts illustrate, it rests on the use of coercive powers of government. Harris had been arrested by the police. While in custody she slumped to the floor on two occasions. The police, rather than obtain medical aid, left her on the floor the second time to prevent her from falling again. She alleged that her injuries stemmed from lack of appropriate medical attention and that in turn had been caused by the city's deliberate indifference to the training of its police.

Because Harris was in custody, she was not free to leave or call for medical attention on her own. Equally important, custody separated Harris from friends and loved ones (and others) who could have provided assistance when she needed medical attention. Under the coercive circumstances of custody, the city breached a constitutional duty. "We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388. *City of Canton* is not an employee safety case nor any other all-purpose

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generalized due process claim, but in either event, as the District Court's opinion in the instant case shows, a plaintiff must allege abuse of power of government to coerce behavior as a part of the due process case. *See also* note 12 *infra*.

substitution for the Court's prior jurisprudence. Rather it is a crafted point, like *Paul v. Davis*, that demarcates ordinary tort from constitutional tort in the situation where, because of the coercive power of the state, a citizen becomes uniquely vulnerable to injury.[12] *City of Canton*, as have all of this Court's prior Section 1983 cases, deals with the wielding of governmental power, not workplace safety.

Petitioner is avowedly seeking the opportunity to supplant the carefully developed state workers' compensation systems and thereby give public employees an additional remedy not generally available to their private counterparts. To soften the force of this would-be grant of an extra cause of action to millions of public employees, Petitioner argues that it is already the law and cites some thirty-five decisions of this Court as demonstrating that public employees are entitled to greater constitutional protection than private employees. Petitioner's Brief at

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[12] M. Wells & T. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L.REV. 201, 229 (1984), elaborate on the rationale: "One difference between governmental and private tort flows from the special role of government as keeper of public order. Because of that role, statutes and common law rules accord government actors broad discretion to use force without fear of civil or criminal liability. Individuals generally acquiese in governmental threats and use of force in circumstances where they might either resist or flee or turn to government for help if similarly threatened or harmed by some private person. For this reason, victims are more vulnerable to the exercise of illegitimate or excessive force by government actors. The individual will often be less willing and less able to resist or escape a beating inflicted by the police officer than, for example, a beating inflicted by a drunk in a bar." (footnotes omitted).

27-28. The City has no quarrel with those cases; indeed, many are essential landmarks of our constitutional order. All of them involve violation of a specific constitutional guarantee; and therefore, conversely none involves a generalized due process claim for personal injury. When put together neither they nor any other cases offer any support for Petitioner's argument that public employees are entitled to bring ordinary tort actions clothed as constitutional claims against their governmental employers. With the exception of the aberrational Eighth Circuit decision in *Ruge*, Petitioner cites no case comparable to the instant case where a plaintiff prevailed. Petitioner's lack of cited authority is for good reason – there is none. This Court's decisions require that when one brings a generalized due process claim, there must be a showing that a government official, by reason of government position, was able to impose a loss on an individual.

While Petitioner contends that an abuse of governmental power is not a requisite to a Section 1983 claim, she attempts to cover her argument by asserting that the higher degree of fault required by *City of Canton* establishes the abuse of power. Thus Petitioner offers this Court two opportunities to implement her system of converting ordinary state law torts into constitutional torts: First, Petitioner argues that an abuse of government power is not a requirement of a Section 1983 claim and second, Petitioner argues that if abuse is required, the degree of fault can be used to establish the abuse. Neither conclusion is supported by the Constitution nor this Court's decisions. Instead, both the Constitution and prior decisions demand splitting constitutional torts from common law torts. When the claim is a violation of due

process, the Constitution requires that a plaintiff demonstrate that the government has abused its coercive powers. That is, the governmental entity must have acted as government toward the citizen as governed using its coercive power possessed because it is the government and must have done so with the requisite degree of fault – which is deliberate indifference to the rights of its citizens, through inadequate training or otherwise.

Presence in a case of the alleged requisite degree of fault does not obviate the requirement for the also requisite abuse of governmental power. The degree of defendant's culpability alone does not give rise to a constitutional violation. A defendant must both have violated some right afforded specific constitutional protection (i.e., Bill of Rights guarantees, privacy, invidious discrimination) or in a generalized due process claim have abused the coercive powers of government, and done so with the requisite degree of fault. *See Rochin v. California*, 342 U.S. 165 (1952).

C. POLICY CONSIDERATIONS UNDERLYING FEDERALISM DEMAND A CLEAR DEMARCATION BETWEEN ORDINARY TORTS AND CONSTITUTIONAL VIOLATIONS

This is the first case since *Paul v. Davis* where the Court is faced with a garden variety tort and, therefore, the first case against a governmental entity for a generalized due process violation not involving alleged misconduct by law enforcement officers. In cases involving municipal liability since *Monell*, this Court has dealt with two overriding concerns: what constitutes an official policy, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v.*

City of Cincinnati, 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and under what circumstances do the actions of the police create liability. *Tuttle*; *City of Canton*. But just as certainly as someone would file a suit like *Paul v. Davis* under Section 1983 after *Monroe v. Pape*, it was inevitable that a case similar to the instant one would follow *Monell*. And just as this Court noted in *Paul v. Davis* that, "[i]t is worth contemplating what the result would be if the strained interpretation of 1443(1) urged by the individual petitioners were to prevail," 424 U.S. at 898 (quoting *Greenwood v. Peacock*, 384 U.S. 808, 832 (1966)), one should do the same here. If Petitioner's theory prevails, the floodgates will be opened. All public employees suffering on the job injuries will have a way, first, to collect workers' compensation and, then, to head for federal court with a Section 1983 action alleging that their employer was deliberately indifferent in its workplace supervisory policies.

First, although Petitioner asserts only a damages claim, she explicitly demands a change in the way the City operates its Sanitation and Sewer Department. Should she prevail, there will be no need for a future plaintiff to be so limited in a request for relief. Since the proof for damages – deliberate indifference plus injury – will satisfy the necessary elements for structural relief,[13] the workplace injury lawsuit of the future will, like the prison conditions suit in *Wilson v. Seiter*, 59 U.S. Law Week 4671 (June 17, 1991), combine a damages claim with a request for institutional relief.

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[13] At least where an injured plaintiff intends to return to the job.

Second, a few examples will quickly demonstrate how completely Petitioner would have this Court convert Section 1983 and the Fourteenth Amendment into an ordinary tort scheme.[14] Certain employees who work at keyboards will develop carpal tunnel syndrome from the repetitive wrist movements. If an employer has enough employees working at keyboards, some employees will eventually develop carpal tunnel syndrome, requiring them to take time off work or possibly to undergo corrective surgery. Assuming that the employer knew that some employees would develop the syndrome, if the employee works for a governmental entity, then the employee, after collecting workers' compensation, may bring a Section 1983 action alleging that the employer was deliberately indifferent to the employee's liberty, personal security, and safety. Other employees may sue for back injuries brought on by lifting heavy objects, for a slip and fall in a puddle of spilled water, or for a heart attack allegedly brought on by work-induced stress. Thousands of ordinary torts will suddenly become constitutional torts so long as the employee alleges the magic words "deliberate

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[14] Even commentary arguing the Court has improperly restricted § 1983 recognizes the necessity of finding an abuse of power and separating constitutional torts from state torts. *E.g.*, S. Bandes, *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L.Rev. 101 (1986): "If a state has abused official power and violated the Constitution. . . ." *Id.* at 162; "*Monell* and *Parratt* thus provide a largely successful means of allocating due process claims between state and federal forums, reserving *serious constitutional* claims for federal scrutiny. . . ." *Id.* at 116 (emphasis added).

indifference." By alleging the further magic words "custom or policy," the public employee may not only sue his fellow employees but also his public employer.

Petitioner argues that these ordinary tort cases will not become constitutional torts because of the higher proposed degree of fault required for these new constitutional cases. This assertion is simply not correct. The lines between ordinary negligence, gross negligence, reckless disregard, and conscious indifference are fuzzy ones. Our courts are not equipped to dispose of these cases by motions to dismiss or motions for summary judgment. It will be a fact issue for a jury to decide whether the acts, omissions, lack of training, etc. of an employer rise to the fault level of deliberate indifference. Thus, by simply invoking the magic words in the complaint, the employee will be able to convert an ordinary tort case into a federal constitutional one because all legal boundaries or standards for what constitutes a constitutional tort will have been abandoned and replaced by a factual standard dealing only with the degree of fault of the governmental entity.

Even if it is conceded that workplace training should be improved, Petitioner has selected the wrong forum. Petitioner offers only a generalized due process claim and the area where such a claim is appropriate is when the state uses its coercive power to curtail liberty. To observe the obvious, a governmental employee is neither in temporary custody like Geraldine Harris, nor in lengthy confinement like Pearly Wilson, much less the victim of deadly force like Albert Tuttle. Petitioner, however, sees decisions about where Americans work as determined by forces beyond control, even more determined than where

Joshua DeShaney would live. Thus Petitioner attempts, Brief at 32, to blur distinctions between workplace options and constitutionally approved custody by the expedient of ignoring reality: decisions where citizens choose to work are neither made nor enforced by governments. Given the Thirteenth Amendment it could not be otherwise.

If there is a need to transform governmental workplace supervision in our federal system, the primary actors are state and local officials. Those failing, the other appropriate forum is the Congress, which may, if necessary, pass preemptive legislation regulating workplace safety. *United States v. California*, 297 U.S. 175 (1936). Until such legislation is enacted, this lawsuit, as both courts below intuitively recognized, was brought in the wrong forum.

II. THE TEXAS HAZARD COMMUNICATION ACT DOES NOT CREATE A SUBSTANTIVE DUE PROCESS LIBERTY INTEREST OR "ENTITLEMENT" FOR MUNICIPAL EMPLOYEES

Petitioner alternatively claims that a Texas statute – the Texas Hazard Communication Act – creates substantive due process rights in municipal employees that were violated by the City. TEX. HEALTH & SAFETY CODE ANN. 502.000 et seq. (Vernon 1991). This claim is nothing short of breathtaking. First, it rests on the premise that state statutes protecting employees from various harms create substantive Fourteenth Amendment rights enforceable in federal courts. Second, it requires reading the Texas Hazard Communication Act (a) to create constitutional rights, while (b) simultaneously ignoring what the statute does

say about enforcement.[15] Third, by federalizing state law, it would freeze the ability of states to experiment with workplace safety (and other) laws.

Petitioner's argument is supported by neither precedent nor logic. State statutes, no matter how enlightened, do not change substantive constitutional rights. This is not to say state law has nothing to do with Fourteenth Amendment analysis. Property interests, for instance, are a product initially of the state. Due process then attaches as protection. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Furthermore, procedural due process protects liberty interests, especially from incarceration, created by state law. *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Mills v. Rogers*, 457 U.S. 291 (1982). But "substantive due process rights are created only by the Constitution." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J. concurring).

It could hardly be otherwise. Even if it can legitimately be argued that Texans enjoy a higher quality of life than other Americans, this happy circumstance is not the result of the Texas legislature imaginatively creating new federal constitutional rights for its citizens. The sweep of the federal Constitution covers more miles in Texas than in most other states, but every mile is covered

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[15] Petitioner says nothing about the enforcement section of the Texas Hazard Communication Act. Section 13(d) authorizes a $5000 civil fine (and § 13(e) provides for a $25,000 criminal fine) and leaves all other available remedies intact. Petitioner, in fact, continues to receive her workers' compensation remedy.

identically no matter which state is involved. Constitutional rights neither increase nor shrink by a decision to cross the Sabine or Red Rivers or any other American state boundary. We are one nation with one federal Constitution and one set of constitutional rights. Whatever rights the decedents of Collins and Ruge may have, they are not different because the Sixty-ninth Texas legislature passed the Texas Hazard Communication Act and the Kansas legislature did not.

While parades of horribles normally have limited utility, the thrust of Petitioner's argument is simply staggering. The claim of constitutional right (personal security as a substantive right because of the Texas statute) would be identical if Collins, rushing out of the sewer because of lack of oxygen had broken his leg. Indeed, if in a rush out of the sewer his wrist watch were destroyed that, too, would be a constitutional violation because of the newly created protections of the Texas Hazard Communication Act. But sewage and sanitation service employees would not be the sole beneficiaries of this doctrine. All municipal employees would have constitutional rights whenever a governmental unit fell out of compliance with applicable state safety laws. If a state passed legislation to protect workers who spend their days looking at computer screens and a municipality did not implement the law, or properly train its supervisors regarding it, then its employees' injuries resulting therefrom would rise to the level of constitutional violations.[16]

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[16] By the same reasoning Congress would create substantive Fifth Amendment rights when it adopts workplace regulations aimed at protecting employees. While this would not

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The necessary result of Petitioner's argument is a triple assault on federalism. First, as already noted, it makes constitutional rights turn on the happenstance of residence when federalism mandates that the Constitution be fairly and uniformly enforced wherever Americans find themselves in this land. Second, federalism mandates that federal authority leave state spheres alone. *Martinez v. California*, 444 U.S. 277, 282 (1980). Third, it defeats the purpose of a federal system by penalizing experimentation with varieties of laws and enforcement mechanisms. If states are to be laboratories of the nation, *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting), then one step at a time implementation of laws, *Railway Express Agency v. New York*, 336 U.S. 106 (1949), must be a reality. Inflating a statutory protection into a constitutional right denies the state the various intermediate choices a legislature must have when it decides to act.

Whether or not a state passes given workplace safety laws (or any other laws) is not a concern of the national government (unless state action is required by applicable federal law). *Compare Steward Machine v. Davis*, 301 U.S. 548 (1937), *with Missouri v. Jenkins*, 110 S.Ct. 1651 (1990). Furthermore, state enforcement of state law is not a national concern. Just as each state has complete freedom to adopt laws appropriate to its circumstances, so, too, each state may select enforcement procedures as it

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have federalism problems, it would be very hard to square with decisions on implied causes of action. *Cort v. Ash*, 422 U.S. 66 (1975).

wishes. Thus a state may have a law on the books but choose, for whatever reasons, not to enforce it. *Bowers v. Hardwick*, 478 U.S. 186 (1986). That is a sovereign prerogative. Similarly, a state may impose exceptionally strong penalties for the violation of a law when other states would not. *Harmelin v. Michigan*, 59 U.S. Law Week 4839 (June 27, 1991). Unless a specific constitutional barrier is breached, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), all these decisions are the exclusive province of state law. Thus it is of no national concern whether Texas enforces the Texas Hazard Communication Act to the letter or leaves it dead on the books as a sop for a once successful lobbying effort. These concerns and choices may be of interest to political scientists, but the decision is for Texans, not for representatives of the federal government.

The choices made by the Texas legislature are like the choices made by Congress. Sometimes a statute carries a full panoply of enforcement mechanisms; sometimes enforcement is left exclusively in administrative hands. Even more than the separation of powers limitations that influence decisions to imply a private cause of action, *Cort v. Ash*, 422 U.S. 66 (1975), federalism creates an impregnable constitutional barrier from functionally creating an implied federal cause of action for violation of a state statute. If Petitioner is concerned with past violations of the Texas Hazard Communication Act, then she should devote her efforts toward having the Division of Occupational Safety and Health of the Texas Department of Health seek civil or criminal penalties under Section 13 of the Act.

Petitioner's argument is not only wrong, it is unconstitutional.[17] The Texas Hazard Communication Act is but a statute; it may be a very good one, but it creates no constitutional rights. Indeed the Constitution itself precludes such an outcome. Texas is free to have such a statute or not. Texas is free to enforce its laws to the hilt or let some, including this one, lay fallow. Any other conclusion would reduce federalism to a slogan rather than a living constitutional reality.

Furthermore, even if Texas law created a liberty or property interest applicable to this case, Petitioner misunderstands the significance of such a conclusion. Since substantive rights are created only by the Constitution, the most that the Texas statute could create for Petitioner is procedural due process protections. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring). In view of this critical distinction, it is necessary to look at the procedural due process afforded by Texas in the current situation, a matter completely ignored by Petitioner.

It is undisputed that Texas provides those in Petitioner's position with a workers' compensation remedy for damages. Such a post-deprivation remedy is sufficient to satisfy due process requirements. *See Ingraham v. Wright*, 430 U.S. 651, 674-82 (1977). Requiring a pre-deprivation hearing would obviously make no sense under the facts of this case. *See Parratt*, 451 U.S. at 541-44; *Hudson v.*

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[17] The City agrees with Petitioner that this case can be disposed of without reaching this issue. Nevertheless, the issue is purely legal and its answer is obvious. Under the circumstances judicial economy would be served by saying so.

Palmer, 468 U.S. 517, 534 (1984). Thus, the Court has previously explained that there is no constitutional mandate for a prior hearing in the

> many circumstances in which the state's conduct, if not adequately justified, would constitute a common law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the Fourteenth Amendment encompasses the same liberties as those protected by the common law.

Ingraham, 430 U.S. at 679 n.47 (quoting Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L.REV. 405, 431 (1977)). Since Texas' statutory remedy satisfies this standard, it meets any procedural due process requirement that might be required in this case.

As this Court stated in *Daniels v. Williams*, 474 U.S. at 322, the Constitution does not exist to supplement traditional tort law: "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Petitioner has whatever remedies she might have under traditional tort law; she does not, however, have a Section 1983 claim against the City.

CONCLUSION

Petitioner's argument, if adopted, would convert Section 1983 into an ordinary tort statute. Petitioner would have a governmental entity held liable to a government employee whenever a certain standard of fault is met, regardless of whether there is an abuse of government power. This Court has repeatedly stated that it will not so convert Section 1983. The Fifth Circuit correctly understood the clear position of this Court on that subject when it wrote in *Rankin*: "[T]o predicate liability under Section 1983 totally on the mere degree of fault would be to convert the due process clause into an ordinary tort statute and to lose sight of the fact that Section 1983 is directed at the abuse of power made possible only because the wrongdoer is clothed in the authority of State law." 762 F.2d at 447-48.

For all of the foregoing reasons, Respondent, the City of Harker Heights, Texas, respectfully requests that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

MYRA JO COLLINS,

Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

Respondent, the City of Harker Heights, Texas (hereinafter "City") and its *amici*, National League of Cities, *et al.*, (hereinafter "NLC") presume incorrectly to restate Petitioner's position, thereby setting up straw men to knock down. For example, they contend that Petitioner (hereinafter "Collins") seeks to extend Section 1983 and constitutional due process protection to municipal actions that fall short of abuse of governmental power. They are wrong. Collins correctly argues that abuse of governmental power is not a separate element of a Section 1983 claim. Rather, abuse of power is established by the City's policy of deliberate indifference in actively placing decedent into a position of danger known to it. Petitioner's Brief at 18-23. This is not after all an ordinary tort case, as the City and the NLC argue; it is a case in which the City – without justification and in violation of statutorily mandated protection – failed to warn, train or properly equip decedent and his supervisors, thereby directly causing decedent's death.

The City's and the NLC's arguments offer precious little case analysis. Instead, they refer to and quote isolated language in court decisions. *E.g.*, Respondent's Brief at 8-13; NLC Brief at 9-10. Principally, the City's and the NLC's arguments begin and end with reliance on convoluted notions of federalism, soldiered by irrelevant parades of horribles. Stripped of their faulty analysis of the precedents and lapses of logic, the City's and the NLC's arguments are reduced to cries of "floodgates". *E.g.*, Respondent's Brief at 18.

The City and the NLC espouse a bright line test, within the municipal employment context, for determining the availability of substantive due process protections to municipal employees. They declare without reason that the only workable test is to exclude substantive due process from the municipal workplace, thereby throwing the baby out with the bath water.

No such bright line jurisprudence is called for, however. Federalism is sufficiently preserved if substantive due process applies only "where the state abuses its governmental power

through an alleged policy of actively placing a person into a situation of known danger . . . . " *Ruge v. City of Bellevue*, 892 F.2d 738, 741 (8th Cir. 1989). *See Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied, sub nom Spears v. Cornelius*, 494 U.S. ___, 108 L.Ed. 2d 785 (1990) (which is not mentioned by Respondent or its *amici*). *See also, e.g., Daniels v. Williams*, 474 U.S. 327, 334-335 (1986).

Contrary to the City's and the NLC's suggestions, federalism has survived the recognition that Fourteenth Amendment protections, and Section 1983, extend beyond their core purposes of protecting the "freed men" and their white supporters. *See, e.g., Monell v. Department of Social Services*, 436 U.S. 658 (1978) (sex discrimination in employment). It has also survived the application of constitutional protections more amorphous than specific prohibitions of the Bill of Rights to the municipal employment relationship. *E.g., Monell*, applying the equal protection of the laws to municipal employment, a subset of substantive due process (*see* H. Monaghan, Of "Liberty and Property," 62 Cornell L. Rev. 405, 416-420 (1977)). Federalism has even survived the Court's recognition that Congress has broad powers to create and define civil rights and liberties of artificial persons that are enforceable against municipalities under Section 1983. *E.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (private corporations may sue a municipality under Section 1983 to enforce rights implicit in the National Labor Relations Act).

Federalism will also survive and be strengthened by this Court's express recognition that, in certain very limited circumstances, substantive due process has been violated when a municipality has acted pursuant to a policy or custom of deliberate indifference to the life (or bodily security) of its employees. Similarly, it will survive and be strengthened by this Court's recognition that in very limited circumstances States create life (and bodily security) interests that give rise to substantive due process protection enforceable under Section 1983.

ARGUMENT

I.

COLLINS HAS PROPERLY STATED A CLAIM FOR MUNICIPAL LIABILITY UNDER SECTION 1983 FOR VIOLATION OF DECEDENT'S SUBSTANTIVE DUE PROCESS RIGHTS.

Section 1983 does not create any substantive rights. *E.g., Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). It facilitates the judicial implementation and enforcement of federally secured rights. Thus, by filing an action under Section 1983, a plaintiff does not allege violation of that statute. *Compare* NLC Brief at 6. Subject to affirmative defenses, in order to prevail in an action filed pursuant to Section 1983, Collins must plead and prove only that a proper defendant, *i.e.*, a "person" within the meaning of Section 1983, (1) acted under color of state law and (2) violated a federally protected right. *Gomez v. Toledo*, 446 U.S. 635 (1980).

The City's discussion of the core purposes and original understanding of Section 1983 is largely irrelevant, as well as somewhat incorrect. Respondent's Brief at 6-8. First, this Court has recognized that both Section 1983 and the Fourteenth Amendment extend protection to all "persons" – not just to the "freedman" and his white supporters. *E.g., Monell.* Further, these protections apply to municipal employees *vis-a-vis* their employers concerning work conditions and circumstances. *Ibid.*

Second, as this Court has repeatedly held, Section 1983 is a broad remedial statute, which is to be interpreted generously. *E.g., Monell*, 436 U.S. at 683-85; *Maine v. Thiboutot*, 448 U.S. 1 (1980).

Third, much of the congressional debate and "purpose" relied upon by the City and the NLC are inapposite, as Section 1 of the Civil Rights Act of 1871 (presently Section 1983) was not the focus of the debate. "Section 1 of the 1871 Civil Rights Act was the least controversial provision of that Act; and what little debate did take place as to § 1 centered

largely on the question of what protections the Constitution in fact afforded." *Chapman*, 441 U.S. at 610-11 (footnotes omitted), referencing *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1155 (1977) (relied upon by the City).

A.

Collins Has Properly Alleged the Necessary *Monell-Harris* Components of a Section 1983 Municipal Liability Failure to Train Claim.

The City is a "person" and therefore a proper defendant under Section 1983. *E.g., Monell v. Department of Social Services*, 436 U.S. 658. Its liability in a Section 1983 action, however, cannot be based upon *respondeat superior*. *Ibid.* Thus, the City is liable under Section 1983 only if the acts complained of resulted from, *i.e.*, were "caused by," a municipal policy or custom. *E.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

The NLC would stand this limitation on its head and require that when a municipality has not adopted a formal policy, Section 1983 actions against the municipality must be derivative of an "unconstitutional act committed by an employee of the city, . . . with 'requisite scienter to establish a constitutional violation'." NLC Brief at 12, *quoting Harris*, 489 U.S. at 388 n.8. Nothing in the *Harris* decision so holds. In fact, in *Harris*, this Court expressly held that:

> [T]he proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines *when such wrongs have occurred.*

Ibid. (emphasis added).

In other words, a municipality is culpable if it has adopted or maintained a policy or custom of deliberate indifference that is causally linked to an injury that implicates a federally secured right. The "culpability" of the other state actors, *i.e.*, the municipality's agents, who are the more direct or efficient cause of the injury, largely is irrelevant. These

agents may merely be negligent. *See Harris*. They may also be obeying the municipal policy. *See Monell.*

Despite this Court's pronouncement in *Harris*, according to the NLC:

> [W]here a police officer has shot and killed an individual, there is no due process violation if the officer acted negligently because a negligent act does not constitute a deprivation of due process. Accordingly, a city would not be liable under Section 1983 even if it had acted with deliberate indifference in training the officer because there still would be no underlying constitutional violation.

NLC Brief at 12.

On its facts, however, *Harris* was a case in which the actual state actors, arresting officers and their immediate supervisors, at most were guilty of negligence precisely because of the City of Canton's custom or policy of inadequately training them. The "intent" component of the claim in *Harris* was satisfied by the municipality's policy or custom of "deliberate indifference." Moreover, in this case, the actions under color of state law of which Collins complains include those of decedent's supervisor. *See* Jt. App. at 31. The supervisor's actions also evidenced his own knowing deliberate indifference. *See, e.g.*, Complaint, Jt. App. at 7, ¶ 2.

Monell requires that a municipal policy or custom be established as an element of municipal liability under Section 1983. However, adoption of that policy need not be formal or express. In a failure to train case, which this is, the municipality will be liable if the acts that caused the deprivation of a federally protected right themselves were caused by the municipality's policy or custom of deliberate indifference to the rights of the persons who were injured. *Harris*. This is what Collins has alleged.

Thus, if there is any "constitutional requirement of scienter under the Due Process Clause," NLC Brief at 12, it has been fully satisfied here by the municipality's and its supervisor's actions. However, actual subjective "scienter" is not required.

This Court's most recent refinement of the deliberate indifference standard appears in *Wilson v. Seiter*, 501 U.S. ___, 115 L.Ed.2d 271 (1991), decided the very day Collins filed her opening brief. *Wilson* is wholly consistent with the analysis presented in that brief.

In *Wilson*, this Court held that the deliberate indifference standard is a necessary component of any Eighth Amendment claim brought by a prisoner for alleged failure to provide medical treatment or humane conditions of confinement. In *Wilson*, this Court expressly differentiated between the "state of mind" showing necessary to make out "deliberate indifference" and "the very high state of mind prescribed by *Whitley* [*v. Albers*, 475 U.S. 312 (1986)]." *Wilson*, 115 L.Ed.2d at 281. The Court held that "deliberate indifference" does not include "wantonness consist[ing] of acting 'maliciously and sadistically for the very purpose of causing harm.' " *Wilson*, 115 L.Ed.2d at 281, *quoting Whitley*.

This middle ground between negligence and malicious intent, encapsulated in the concept of "deliberate indifference" has long been recognized in tort law. Prosser and Keeton have termed this middle ground

> [a] penumbra of what has been called "quasi intent." To this area the words "willful," "wanton," or "reckless," are customarily applied. . . . They apply to conduct which is still, at essence, negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended. . . . The usual meaning assigned to [these terms] . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and thus is usually accompanied by a conscious indifference to the consequences.

Prosser & Keeton, *The Law of Torts*, § 34 at 212-13 (5th ed. 1984).

Once malice is distinguished from deliberate indifference, it follows that deliberate indifference does not

involve a subjective determination of the state actor's intent or require direct proof of a person's actual state of mind. As Prosser and Keeton put it:

> Since [conscious indifference] is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. The "willful" requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position.

Prosser & Keeton, *The Law of Torts*, § 34 at 213-14.

Contrary to the contentions of the NLC (NLC Brief at 11-13), Collins amply made the requisite *Monell-Harris* allegations for municipal liability here. *See generally* Complaint, Jt. App. at 3-8; Petitioner's Brief at 2-5 (quoting and summarizing the allegations). The City and the NLC entirely ignore these deliberate indifference and causation allegations.

The City and the NLC also ignore the principle that an action may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Conley v. Gibson*, 355 U.S. 41, 46-51 (1957); *see, e.g., Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 117 (1990). Thus, for example, the NLC improperly relies on post-trial and summary judgment decisions to argue that the Complaint is inadequate. *E.g.*, NLC Brief at 13, n.4, relying on *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985).

B.

Collins Has Properly Alleged the Necessary Color of State Law and Invasion of Federally Protected Rights Elements of a Section 1983 Claim.

In addition to satisfying all *Monell-Harris* pleading requirements, Collins' complaint also properly pleads the

necessary elements of her Section 1983 claim. First, as alleged, the City's policy of deliberate indifference in failing to train, equip or supervise, constituted actions of the City performed under color of state law. A municipality cannot perform otherwise. All other acts causing decedent's death also were performed under color of state law. *Compare DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *See* Petitioner's Brief at 20-22. Thus, the first "element" of Collins' Section 1983 claim is fully satisfied. *See Gomez v. Toledo*, 446 U.S. 635.

All that remains, therefore, is to determine whether Collins can plead the second element of the Section 1983 claim, invasion by the City of a federally secured right enjoyed by decedent. Collins has so pled and the pleading is sufficient.

Section 1 of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property without due process of law. . . . " This Court has held that due process of law includes a substantive component that does not depend upon other express protections in the Constitution. At the very least, substantive due process bars "certain government actions [invasive of life, liberty or property] regardless of the fairness of the procedures used to implement them. . . . " *Daniels v. Williams*, 474 U.S. at 327, 331. *Accord Davidson v. Cannon*, 474 U.S. 344 (1986). *See* cases discussed in *Daniels* at 431-32; Petitioner's Brief at 29-37.

It follows from the language of the Fourteenth Amendment, which protects "life, liberty or property" and this Court's decisions, that substantive due process protects a person's "life" from gross abusive actions of government, *i.e.*, actions constituting abuse of government power. *E.g.*, *Daniels*; *Davidson*; *Harris*. In other words, abuse of government power is inherent in a municipality's invasion of a federally secured right, such as "life" or bodily security, if the injury is caused *by the municipality* with sufficient deliberate indifference. Petitioner's Brief at 29-37. *See Ruge v. City of Bellevue*, 892 F.2d at 741 and n.6; *see also McClary v. O'Hare*, 786 F.2d 83, 89, n.6 (2nd Cir. 1986). The City now admits that "the Fifth Circuit may have been overly technical in stating that abuse of power was an independent aspect of a

§ 1983 claim. . . . " Respondent's Brief at 13-14 n.11. No amount of quoting this Court's decisions out of context by the NLC or the City can make "abuse of governmental power" into a separate element of a Section 1983 claim.

This Court's controlling decisions teach that the difference between a government-caused loss of life that constitutes abuse of government power, and therefore violates due process of law, and one that does not, turns entirely on considerations of whether the *particular defendant* acted with deliberate indifference or just mere negligence. *See, e.g.*, *Davidson*, 474 U.S. at 347. Thus this Court has adopted the "deliberate indifference" standard as part of the definition of the Fourteenth Amendment substantive due process right enjoyed by the particular plaintiff *vis-a-vis* the particular defendant.

This "deliberate indifference" component of the constitutional right essentially is the same as the standard for establishing municipal liability in a failure to train case. *See Harris*; Point I.A., *supra* at 4-7. Hence, it is difficult not to conflate the two components. *Compare* NLC Brief at 12.

Municipal adoption and implementation, whether formal or otherwise, of a grossly deficient policy of deliberate indifference must be established to demonstrate the possibility of municipal liability under *Monell*. Under *Harris*, invasion of the substantive due process right results from the municipality's "acts" of deliberate indifference in failing to train if that failure is a proximate cause of injury to a person's life, liberty or property, where, as here, no efficient independent private cause has intervened. *DeShaney*, 489 U.S. 189. *See* Petitioner's Brief at 20-22. Because the state actor in a failure to train case is the municipality itself, the culpability of the municipal employees or agents who visit the actual harm on the plaintiff is irrelevant to the municipality's liability. All that is necessary is that the municipality's failure to train have "caused" the agents' actions which in turn "caused" the deprivation of the constitutional rights. *Harris*. *See* Point I.A., *supra* at 4-7.

Contrary to Respondent's arguments, this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976) is inapposite.

Respondent's Brief at 10-11, 15-18. Moreover, *Paul* preceded *Daniels* and *Davidson* by a decade; it preceded *Harris* by 13 years. Those later cases are controlling as to substantive due process life and bodily security claims, not *Paul*, which involved injury to plaintiff's reputation.

In *Paul*, the Court held that the Due Process clause is not to become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. Collins does not contend otherwise. The Court also held that the Due Process clause does not "ex proprio vigore extend [to plaintiffs] a right to be free of injury whenever the State may be characterized as the tortfeasor." *Ibid.* Collins does not contend otherwise. Specifically, in *Paul*, the Court held that, without more, even intentional invasion of a person's reputation, by state actors, does not violate the Due Process clause where the invasion of reputation "does not result in deprivation of any 'liberty' or 'property' recognized by state or federal law, nor . . . work[] any change of respondent's status as theretofore recognized under the State's laws." 472 U.S. at 712.

The Court's only discussions, in *Paul*, of state actions invasive of a substantive due process interest in life recognized that negligent acts "under color of state law" that take a person's life do not of themselves violate the Fourteenth Amendment. *Paul*, 424 U.S. at 698. Similarly, the Court properly identified the heightened standards that must be met for *criminalizing* state taking of a human life. *Id.* 424 U.S. at 699-700.

In its discussion, the *Paul* Court acknowledged that "it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury." *Ibid.* As the Court in *Paul* acknowledged, "life" is specifically enumerated in the due process clause of the Fourteenth Amendment; reputation is not expressly protected anywhere in the Constitution, and the Court declined in *Paul* to infer such protection from any provision of the Constitution. By contrast, *Daniels*, *Davidson*, *Harris* and numerous other decisions make it clear that life and bodily security are included

within substantive due process protection from "deliberate indifference."

C.

Collins' Properly Pleaded Section 1983 Claim is Not Barred by Virtue of Decedent's Status as a Municipal Employee.

All that remains to the City's and the NLC's legal position is their argument that a municipality's invasion of an employee's life or bodily security can violate no constitutional interest because the invasion occurs through the municipality's action as employer. Respondent's Brief at 14-17; NLC's Brief at 16-20. They overstate their position.

The City and the NLC essentially argue that deprivation of life is wholly unprotected within the municipal employment relationship. This Court has never so held. However, it has repeatedly recognized that whatever constitutional protections are available to a person protect that person within his or her employment relationship from adverse action by his or her public employer. *E.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987). *See* Petitioner's Brief at 25-29. Contrary to the implications of the City and the NLC's arguments, many of this Court's decisions on this subject involve employee lawsuits charging the employer with adverse action taken by the municipal employer as employer against the municipal employee as employee, *not* action taken by the government against the governed. *E.g.*, *Ortega*; *Monell*.

The City and the NLC are reduced to arguing that substantive due process protection of life somehow is different from other constitutional protections, so far as application to the municipal employer-employee relationship is concerned. *See* NLC Brief at 19-20; Respondent's Brief at 17-19. Apart from sloganizing, the only ostensible argument offered for this proposition is that public employees are not "restrained in their liberty" in the same way as are prisoners or involuntarily committed mental patients. NLC Brief at 17-19; Respondent's Brief at 14-15. Yet, as the NLC quoted in its Brief at 17, this Court has held, in the involuntary commitment context, that

the Due Process clause imposes on the States an "unquestioned duty to provide reasonable safety for all residents *and personnel* . . . . " *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (emphasis added). This is so even though the "personnel" of mental hospitals, like sewer workers, presumably are "free" to quit their jobs if they do not like the "safety" conditions.

The fact that a person is incarcerated has a bearing on whether that person is protected by the Eighth Amendment. *Ingraham v. Wright*, 430 U.S. 651 (1977). Neither a public school student's obligations under compulsory school attendance laws nor one's obligations as a public employee sufficiently constrain one's liberty to engage the Eighth Amendment's protection. *Ibid.* Both, however, the student and the public employee are sufficiently "subjected" to government power to engage procedural due process protections of the Fourteenth Amendment. *Ibid*; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *see also* Petitioner's Brief at 25-27. The NLC's textual argument, based on the actual words of Section 1983 (NLC Brief at 6), actually demonstrates this point.

Only a person "who under color of [law], . . . subjects or causes to be subjected, any . . . person to the deprivation of any rights . . . secured by the Constitution or laws, shall be liable to the party injured in an action at law. . . . " 42 U.S.C. section 1983. The "contemporary source" relied upon by the NLC defines the word "subjection" as: "The obligation of one or more persons to act at the discretion or according to the judgment and will of others." 2 Bouvier's Law Dictionary 553 (11th ed. 1865), *quoted in* NLC Brief at 6. The NLC paraphrases the remainder of the 1865 definition as follows: "Subjection was separated into two categories, private subjection such as that of parents over children; and public subjection, of government over the citizenry." NLC Brief at 6 n.3. This paraphrase is grossly misleading. According to the 1870 edition of Bouvier's, "subjection" means:

> The obligation of one or more persons to act at the discretion or according to the judgment and will of others. *Private subjection is subjection to the authority of private persons. Public subjection is the subjection to the authority of public persons.*

2 Bouvier's Law Dictionary 551 (14th ed. 1870) (emphasis added).

Whatever "subjection" may have connoted in 1870 or now connotes, the denotation has remained the same. *Accord* Black's Law Dictionary 1278 (5th ed. 1979) (using only the same first sentence as in Bouvier's). Moreover, at present, "subjects to," undefined in Bouvier's, is now defined as "liable, subordinate, subservient, inferior, obedient to, governed or affected by; provided that; provided; answerable for." *Black's*, at 1278. In any event, within his or her job, even applying the Nineteenth Century definition of "subjection" to today's world (see Petitioner's Brief at 26-27), a municipal employee is "obligated to act at the discretion or according to the judgment or will of . . . " the municipal employer.

The constraints of procedural due process would apply to action by a municipal employer, acting as employer rather than as governor, to protect a municipal employee's property and liberty interests in public employment, and to extend procedural due process protection to those interests. *E.g.*, *Cleveland Board of Education v. Loudermill*, 479 U.S. 532. Logic does not permit a contrasting rule that substantive due process constraints never apply to protect the same employee's life or bodily security. In fact, contrary to the City's and the NLC's arguments, at least three of the Circuits properly have recognized that substantive due process protects the public employee's "life" or bodily security from highly culpable invasion by the employer. *Ruge v. City of Bellevue*, 892 F.2d 738; *Cornelius v. City of Highland Lake, Alabama*, 880 F.2d 348 (ignored by the City and the NLC); *McClary v. O'Hare*, 786 F.2d at 89 n.6 (relevant discussion ignored by the City and the NLC).

II.

THE TEXAS HAZARD COMMUNICATION ACT CREATES A FOURTEENTH AMENDMENT DUE PROCESS LIFE AND LIBERTY INTEREST IN PROTECTION FROM THE VERY HAZARDS TO WHICH DECEDENT SUCCUMBED, THAT IS COGNIZABLE UNDER SECTION 1983.

The City appears to concede that, as pled, its failure to warn, train, equip or supervise violated the Texas Hazard

Communication Act. Respondent's Brief at 21-27. The City appears to argue, however, that the existence of public enforcement remedies under the Act, and private remedies under Texas' workers' compensation law, preclude Collins from relying on the Hazard Communication Act as a source of federally protected rights enforceable under Section 1983. Respondent's Brief at 22 n.15; *id.* at 2 nn. 2 & 3. (Most of the facts presented by the City are not in the record.) *See also* NLC Brief at 25. The City is incorrect.

The existence of workers' compensation remedies does not defeat Collins' Section 1983 claim for violation of decedent's substantive rights. *E.g., Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed. 2d 100 (1990) (post deprivation state remedy not relevant to deprivation of substantive constitutional rights); *Monroe v. Pape*, 365 U.S. 167 (1961). Moreover, because Collins alleges that the City's policy of deliberate indifference caused decedent's death, it cannot be assumed or suggested that the constitutional violation resulted from "random *and* unauthorized" violations of State law. Availability of state remedy, therefore, is irrelevant. *Zinermon. See also* Petitioner's Brief at 47, discussing adequacy of post-deprivation remedies. (In the citation to *Zinermon* in the Opening Brief, Petitioner inadvertently linked *Zinermon's* holding to claimed violations of a "liberty interest". The correct link is to a claimed violation of a "substantive constitutional right".)

Similarly, the existence of a state statutory remedy under the Texas Hazard Communication Act does not preclude reliance on the Act as a basis for a Section 1983 claim. First, the "liberty" and "life" interests afforded by the Act's "substantive predicates" are themselves substantive and therefore cannot be satisfied by a state post-deprivation remedy. *See Zinermon*. Moreover, once the state creates an interest that is subject to constitutional protection, the adequacy of the state protection or remedy itself is a federal constitutional issue. *See, e.g., Zinermon*. Second, the Act's "post-deprivation" remedies are inadequate as the Act provides only limited public remedies that include no compensation to Collins for the loss of her husband. Br. App. A-12-13, Section 13, Texas Health and Safety Code (hereinafter "H. & S. C.") Section

502.012 (Vernon 1991) (Citations to the Act are to the Appendix to Petitioner's Brief and to the H. & S. C. *See* Petitioner's Brief A-1-33.) Moreover, the Act specifically provides that its criminal penalty for causing injury to an employee "does not affect any other right of an employee or any other person to receive compensation for damages under other law." Br. App. A-13, Section 13(c), H. & S. C. Section 502.012(g). *Cf. Golden State Transit Corp. v. City of Los Angeles*, 107 L.Ed.2d at 428.

The NLC argues that the Texas Hazard Communication "Act does not protect workers in Collins' position." NLC Brief at 20-21. The NLC's argument relies entirely on the fact that sometimes the Act speaks of workers' "use" or "handling" of hazardous chemicals rather than as the Act often does of their contact with or "exposure" to them. *Ibid.*

The NLC reads the Act too selectively, as the Act's announced purpose is to protect "employees *who may be exposed to* hazardous chemicals in nonmanufacturing employer workplaces. . . . " Br. App. A-4, Section 2, H. & S. C. Section 502.002 (emphasis added). Moreover, "employee" is defined as "any person who *may be or may have been exposed to* hazardous chemicals in the person's workplace under normal operating conditions or foreseeable emergencies." Br. App. A-5, Section 3(6), H. & S. C. Section 502.003(9) (emphasis added). Moreover, "New or newly assigned employees shall be provided training before working with *or in a work area containing hazardous chemicals.*" Br. App. A-11, H. & S. C. Section 502.010(d) (emphasis added). "Employees *who may be exposed to* hazardous chemicals shall be informed of the exposure. . . . " Br. App. A-14, Section 15(a), H. & S. C. Section 502.013(b) (emphasis added); *Accord*, Br. App. A-22, Section 2, Texas Administrative Code, Section 295.5 (Notice form).

Further evidence of the Act's application in this case is provided by the definition of " 'nonmanufacturing employer' or 'employer' " to include an employer in "sanitary services" and municipal employers. Br. App. A-6-7, Section 3(13), H. & S. C. Section 502.003(16).

Finally, for good reason the City did not join the NLC's argument, which was not raised below or previously to this Court. If there were any doubt as to the applicability of the Act, the State of Texas does not share that doubt. On May 31, 1989, the State of Texas sued the City of Harker Heights in the District Court of Bell County, Texas for violations of the Texas Hazard Communication Act causing decedent's death. On November 9, 1989, a Judge of that Court entered an Agreed Final Judgment, by which, admitting no liability, the City agreed to pay civil fines of $3,000, attorneys' fees of $1,000 and costs. Petitioner has moved this Court to take judicial notice of certified copies of the Docket Sheet, Petition and Agreed Final Judgement in that case, *State of Texas v. City of Harker Heights*, Bell County, Texas District Court No. 124,477-C. Certified copies of the above-described documents are attached to the Motion.

The City's and the NLC's substantive arguments as to the Texas Hazard Communication Act warrant little response here, as they were largely anticipated and answered in Collins' Opening Brief (at 40-47). Their arguments consist mostly of trumpeted slogans, including "floodgates" and "parade of horribles." Respondent's Brief at 17-21. These concerns are addressed in point III below.

One argument presented by the NLC is the obverse of the City's and the NLC's argument that the Due Process clause itself confers no substantive due process right on Collins that is cognizable under Section 1983. The NLC argues that because the Texas Hazard Communication Act extends its protections to both public and private employees, it is insufficiently specific in "govern[ing] the relation between the State and a defined group of individuals" to give rise to federal due process protection. NLC Brief at 23. By contrast, in opposing Collins' pure substantive due process claim, both the NLC and the City argue that, within the employment relationship, public employees are entitled to no greater protection of life or bodily security than are private employees. NLC Brief at 9-10; Respondent's Brief at 15-17.

This Court's decisions recognizing constitutional protection for state-created property and liberty interests for

employees does not require that the state statute, creating the "substantive predicates," protects only public employees. *Cf. Golden State Transit Corp. v. City of Los Angeles*, 107 L.Ed.2d at 421 ("The availability of the § 1983 remedy [to enforce a federal statute governing collective bargaining relations in the private sector] turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce' . . . is intended to benefit the putative plaintiff and is not foreclosed 'by express provision or other specific evidence from the statute itself.' " (citations omitted)).

Moreover, contrary to the NLC's arguments (NLC Brief at 24), private employees will not be able to sue private employers under Section 1983 for injuries due to violations of the Texas Hazard Communication Act, as private employers owe no constitutional obligations to their employees, and in any event private employers do not act "under color of state law." *See O'Connor v. Ortega*, 480 U.S. 709.

Finally, recognition of Collins' claim based on the Texas Hazard Communication Act will open no "floodgates" and will not jeopardize "federalism". The municipality will be liable under Section 1983 only when a municipality violates a state regulation pursuant to the municipality's policy or custom, only when the municipality's policy or custom rises to the level of "deliberate indifference" to and proximately causes deprivation of the employee's rights, and only if no independent private cause intervenes. *Contrast* NLC Brief at 25. Further, no claim would lie against a municipal employee's fellow servants, as only the municipal "employer" owes duties under the Act.

In enacting the Act, the State of Texas has balanced the interests of employees and employers, including municipal employees and employers, and mandated substantive predicates creating a justifiable expectation of certain protections of employee's lives and bodily security. *Cf. Washington v. Harper*, 499 U.S. 210 (1990). As the principal guardian of federalism within its own borders the State of Texas is free to close that "floodgate" any time it chooses. *Cf. Golden State Transit Corp.*, 107 L.Ed.2d at 432.

III.

JUDICIAL RECOGNITION OF PETITIONER'S CLAIMS WOULD NOT "OPEN THE FLOODGATES," THREATEN THE PROPER ORDER OF CONSTITUTIONAL FEDERALISM, RENDER SECTION 1983 "A FONT OF TORT LAW" OR OTHERWISE "FEDERALIZE THE LAW OF TORT" OR "TRIVIALIZE THE CONSTITUTION."

Collins has not pled an "ordinary" tort. She has pled "deliberate indifference" by the City that actually caused her husband's death. He was sent to his death by the City, without warning, training, equipment or supervision, even though the City knew of the extraordinary risk of death decedent faced *and* the City was required by a state statute properly to warn, train, equip and supervise decedent. Whatever may have been happening elsewhere in the State of Texas, plainly the City was "unwilling[] to enforce relevant State law." *See* NLC Brief at 7.

The City's attempt to trivialize what it did to decedent by presenting hypotheticals involving, for example carpal tunnel syndrome, is argument by naked *reductio ad absurdum*. *See* Respondent's Brief at 19-20, 23.

Municipal employees and their attorneys may not simply invoke the words "deliberate indifference" or "custom or policy," and proceed to sue a municipality under Section 1983. They cannot convert mere negligence into "deliberate indifference," if there are no facts to bear out their claims.

It is ironic that the City's "floodgates" argument turns on its misperception that:

> The lines between ordinary negligence, gross negligence, reckless disregard, and conscious disregard are fuzzy ones. Our courts are not equipped to dispose of these cases by motions to dismiss or motions for summary judgment.

Respondent's Brief at 20.

Fortunately, this Court disagrees. As then Associate Justice Rehnquist stated, when a Section 1983 plaintiff's attorney made a similar argument:

> In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary[.] . . . More important, the difference between one end of the spectrum – negligence – and the other – intent – is abundantly clear. See O. Holmes, The Common Law 3 (1923). In any event, we decline to trivialize the Due Process clause in *any* effort to simplify constitutional litigation.

Daniels, 474 U.S. at 434-35 (citations omitted) (emphasis added).

In evaluating complaints under Section 1983, certainly by the summary judgment stage, trial judges will be able to determine whether plaintiff has any evidence of "deliberate indifference," municipal "custom or policy," causation and damages. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In making that assessment, these judges may give due consideration as well to doctrines such as "assumption of the risk." *See* Petitioner's Brief at 38-40.

Since judges cannot always forget as judges what they know as people, we can be confident that facially frivolous or outrageous claims will be dismissed under Rule 12(b)(6). *See, e.g., Anderson v. Everett Area School Board*, 732 F.Supp. 39 (W.D. Pa. 1989); *cf. Daniels*, 474 U.S. at 334-35. Such frivolous claims almost surely would include Respondent's carpal tunnel syndrome, lifting and slip-and-fall hypotheticals (Respondent's Brief at 19-20) and the claim of the City's hypothetical sewer worker who destroys his wrist watch when rushing from the sewer to avoid asphyxiation. *Id.* at 23. Woe betide any plaintiff or plaintiff's attorney who files or prosecutes a frivolous or absurd lawsuit. *See* Rule 11, Federal Rules of Civil Procedure (ignored by the City and the NLC).

The "floodgates" also would not be opened, by permitting this Complaint to be prosecuted, to suits by state employees against the State or suits by federal employees against the United States. The States *and* their agents are protected by Eleventh Amendment sovereign immunity from such claims. *E.g., Quern v. Jordan*, 440 U.S 332 (1979);

Edelman v. Jordan, 415 U.S. 651 (1974). A State also is not a "person" and therefore cannot be sued under Section 1983. *Will v. Michigan State Department of Police*, 491 U.S. 58 (1989). Similarly, the United States is not a person within and cannot be sued under Section 1983. *Cf. Will.* Nor is action by the United States or its agents "under color of state law" within Section 1983. Moreover, the United States itself is protected by sovereign immunity from actions against it, constitutional or otherwise. The Federal Tort Claims Act provides the only remedy against the United States to a government worker making claims similar to those of Collins. *See, e.g.*, 28 U.S.C. Sections 2671, *et seq.*, and Sections 2676 and 2679(b)(1) thereof.

CONCLUSION

For the foregoing reasons, the Judgment of the United States Court of Appeals of the Fifth Circuit should be reversed and the case should be remanded to that Court with instructions to direct the United States District Court for the Western District of Texas to vacate its Judgment of dismissal. Alternatively, the Court should instruct the Court of Appeals to decide or have the District Court decide in the first instance, the question whether Collins has properly asserted a right protected by the Fourteenth Amendment.

September 9, 1991

Respectfully submitted,

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Supreme Court, U.S.
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(5)

No. 90-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted by the National Education Association (NEA) with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

NEA is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges and universities. The issue presented in this case is whether the Constitution applies to (and in turn whether a § 1983 action will lie as the result of) certain conduct of governmental entities, most particularly actions taken in their capacity as public employers and more generally the performance of functions that are not uniquely "governmental" in nature. The members of

NEA, as public employees, have a direct interest in the disposition of this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner brought an action under 42 U.S.C. § 1983 against the City of Harker Heights, Texas. She alleged that as a consequence of a municipal policy or custom of deliberate indifference to threats to the lives of employees in the City's sanitation and sewer department, her husband, a municipal sewer worker, was deprived of his life in violation of the substantive component of the Due Process Clause of the Fourteenth Amendment. Joint Appendix ("JA") at 4-9.

In dismissing petitioner's § 1983 suit for failure to state a claim, the Fifth Circuit found it unnecessary to decide whether petitioner had adequately alleged a violation by the City of her deceased husband's substantive due process right to life. JA at 48. Instead, the court held that to state a claim under § 1983, a plaintiff must allege *something more* than the violation of his or her constitutional rights by state or municipal government; in addition, the plaintiff must allege that the violation occurred while the government was acting *in its capacity as "a governing authority."* *Id.* at 45. In other words, to state a claim under § 1983, a plaintiff must, according to the court below, allege that he or she was victimized by an abuse of power that is uniquely "governmental" in nature. Because the City had acted only *in its capacity as an employer* with respect to petitioner's deceased husband —and was thus chargeable with "at most the abuse of power [of] which any private employer might be guilty" (*id.* at 51)—the court held that petitioner had failed to state a claim under § 1983.

In Part I below, we demonstrate that the Fifth Circuit erred by focusing on the capacity in which government acts, rather than on the "essential dichotomy" in our constitutional system between state and private action. *See* pp. 5-7, *infra*. Under the Constitution, government—as "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)—is held to a different and higher standard than would apply to a private party engaging in the same conduct. Thus, this Court has consistently and repeatedly held that government *in all capacities*, including its capacity as employer, must conform its conduct to constitutional requirements, even though private actors engaged in similar conduct are not subject to such requirements. *See* pp. 7-14, *infra*.

In Part II below, we identify the allegations that *are* necessary to make out a violation of the Constitution (and hence to state a § 1983 claim) in a case where, as here, damages are sought against government for allegedly depriving a person of a right protected by substantive due process. Essentially, a plaintiff must allege that *the governmental entity itself* has *arbitrarily or capriciously* (and not negligently) caused that deprivation. *See* pp. 14-21, *infra*. Petitioner has adequately made the necessary allegations here. *Id.*[1]

[1] A separate issue posed by the *writ of certiorari* is whether the Texas Hazard Communication Act, Texas Health and Safety Code, §§ 502.003 *et seq.* (Vernon 1990), gave petitioner's deceased husband a life or liberty interest in receiving safety training and equipment in accordance with its terms that was entitled to protection against state deprivation under the substantive component of the Due Process Clause of the Fourteenth Amendment. *Amicus* does not address that issue in this brief.

ARGUMENT

I. ACTIONS OF GOVERNMENT, IN ALL OF ITS CAPACITIES, INCLUDING ITS CAPACITY AS A PUBLIC EMPLOYER, ARE SUBJECT TO SCRUTINY UNDER THE CONSTITUTION.

A. Although the Fifth Circuit's decision is framed in terms of whether § 1983 provides a cause of action against a governmental entity charged with violating the Constitution in its capacity as an employer, the court's decision must be taken to mean that *the Constitution itself* imposes no obligations or restrictions on the government when acting as an employer. This is necessarily the case because, as this Court has repeatedly recognized, § 1983 creates no substantive law from which a distinction between "governmental" and "employment" actions by government might conceivably be drawn. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) ("[Section 1983] did not provide for any substantive rights—equal or otherwise. . . . [O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything."). *Accord, e.g., Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion); *Felder v. Casey*, 487 U.S. 131, 158 (1988) (O'Connor, J., dissenting).

Section 1983 creates a federal *remedy* for the violation of substantive rights that exist, not by virtue of § 1983, but by force of the Constitution or laws. *See, e.g., Chapman, supra*, 441 U.S. at 617-18; *Baker, supra*, 443 U.S. at 140, 144 n.3; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *Jett v. Dallas Independent School District*, 491 U.S. 701, 722-31 (1989). In the words of the Senate manager of § 1983, the statute is " 'so very simple and really reenact[s] the Constitution.' " *Lugar*, 457 U.S. at 934 (quoting Cong. Globe, 42d Cong., 1st Sess. 569 (1871) (statement of Senator Edmunds)). Thus, the Fifth Circuit's conclusion that § 1983 cannot be invoked to challenge employment-related conduct by the

government is necessarily a conclusion that *the Constitution itself* does not apply in this context.

The implications of the Fifth Circuit's decision are, in fact, even broader than this. Reduced to its essentials, the Fifth Circuit's reasoning is that an action is not uniquely "governmental," and is not subject to constitutional constraints, if the action is of a kind that a private entity could take. But that reasoning would apply not only to the government's actions as an employer, but to numerous other activities routinely engaged in by state and local governments—including the provision of education, transportation, sanitation, sewer and other public services—that are not and have not historically been the exclusive province of government.

B. The Fifth Circuit's position is, however, as incompatible with our constitutional system as it is pregnant with implications. The Fourteenth Amendment—which is the direct source of the substantive rights invoked by petitioner in this case, and which makes various other constitutional provisions applicable to the States, *see, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964)—provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment does not purport to distinguish among various species of state action. To the contrary, the Amendment is broadly phrased to prohibit any and all forms of state action that violate the rights enumerated therein.

Following the plain language of the Fourteenth Amendment, this Court consistently has read the Amendment as establishing an "essential dichotomy . . . between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrong-

ful,' against which the Fourteenth Amendment offers no shield." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (emphasis added) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). *Accord, e.g., Lugar, supra*, 457 U.S. at 936-37; *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). *Within* the universe of activities that constitute state action, however, this Court *never* has recognized a dichotomy between uniquely "governmental" functions on the one hand, and "employment" or "proprietary" functions on the other. To the contrary, as this Court held over one-hundred years ago in the *Civil Rights Cases*, 109 U.S. 3 (1883):

> Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void *all* state legislation, *and state action of every kind*, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. [*Id.* at 11 (emphasis added).]

There is nothing surprising about this. Under our Constitution it is simply and indubitably the case that government—as "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)—is held to a different and higher standard than would apply to a private party engaging in the same conduct.

Whether or not the essential dichotomy between state and private action embodied in the Fourteenth Amendment "is good or bad policy, it is a fundamental fact of our political order." *Lugar, supra*, 457 U.S. at 937. And it is an equally fundamental fact that the Constitution is applicable to "state action of every kind," *Civil Rights Cases, supra*, 109 U.S. at 11, regardless of how comparable that state action might be in certain circumstances to the conduct of private actors.

C. In the public employment context in particular, this Court has on numerous occasions held that public employers must in their relations with employees conform their conduct to constitutional norms. To be sure, in these cases this Court has recognized that government in its capacity as employer has legitimate interests distinct from those it has in other capacities, and those interests must be taken into account in the constitutional balance just as any legitimate governmental interest must be taken into account. *See* pp. 12-13, *infra*. In *all* of these cases, however, the Court has clearly understood that the mere fact that the government is functioning as an employer does not render constitutional guarantees inapplicable.

For example, the employment practices of state and local governments must conform to the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to classifications based on such factors as race, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), sex, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Forrester v. White*, 484 U.S. 219 (1988), age, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and citizenship, *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Foley v. Connelie*, 435 U.S. 291 (1978); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Although a private employer might engage in discrimination of the same kinds as that in which a governmental employer engages, the Equal Protection Clause reflects that the eradication of *governmental* discrimination in all forms, including employment, "is of unique importance"—and hence of *constitutional* dimension. *Wygant, supra*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 277 (plurality opinion) ("[P]ublic employers, including public schools, . . . must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with

all governmentally imposed discriminations based on race.'") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

Similarly, government must provide due process of law in the context of public employment. Thus, this Court has repeatedly held that those public employees who have property rights in their employment under state law may not be deprived of those rights by state or local governments without appropriate procedural safeguards. *See, e.g., Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *NCAA v. Tarkanian*, *supra*. This Court has reasoned in these cases that while property interests "may take many forms," *Roth*, 408 U.S. at 576—including public employment—a property interest in *any* form triggers the protections of the Due Process Clause against deprivations by government. *Accord Goss v. Lopez*, 419 U.S. 565, 573 (1975).[2]

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[2] This Court's decision in *NCAA v. Tarkanian* illustrates with particular clarity that this principle holds true without regard for the fact that the Due Process Clause does not reach similar deprivations by *private* actors. That case involved a decision by the University of Nevada, Las Vegas ("UNLV")—a State University—to suspend its basketball coach, Jerry Tarkanian. The actual issue before the Court was whether the NCAA—a *private* actor—could be found to have acted jointly with UNLV in the decision to suspend Tarkanian so as to render the NCAA a "state actor" for purposes of that decision. Although the Court divided 5-4 in answering this question in the negative, all members of the Court agreed that the identity of UNLV as a *state* actor was sufficient in and of itself to trigger the protections of § 1983 and the Due Process Clause:

> Here the final act challenged by Tarkanian—his suspension—was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment. . . . Thus when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983. [488 U.S. at 183, 192-93 (citations omitted); *accord id.* at 199 (White, J., concurring).]

The *substantive* guarantees of the Due Process Clause —which are invoked by petitioner in this case—are no less protected against infringement by government merely because the infringement occurs in the employment context. *See, e.g., Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (public employer's mandatory maternity leave policy for teachers violates substantive due process); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (same); *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979) (applying substantive due process analysis to actions of public employer); *Kelly v. Johnson*, 425 U.S. 238 (1976) (same).

That the Constitution defines the limits of state power in the employment context is further demonstrated by this Court's numerous decisions involving those provisions of the Constitution made applicable to the States by the Fourteenth Amendment. Thus, for example, the First Amendment delimits the power of state and local employers to hire, fire and promote employees based on political patronage, *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party*, —— U.S. ——, 110 S. Ct. 2729 (1990), to penalize employees because of their speech, *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987), to require nonmember employees to pay fees to a union as a condition of employment, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Association*, 59 U.S.L.W. 4544 (U.S. May 30, 1991), to require loyalty oaths as a condition of employment, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Baggett v. Bullitt*, 377 U.S. 360 (1964);

Elfbrandt v. Russell, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), to require belief in God as a condition of employment, *Torcaso v. Watkins*, 367 U.S. 488 (1961), and to deny employees and unions access to the workplace for speech-related activities, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Similarly, public employees are protected by the Fourth Amendment against unreasonable searches or seizures by their employers, *see O'Connor v. Ortega*, 480 U.S. 709 (1987); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and by the Fifth Amendment from being dismissed for refusing to waive the privilege against self-incrimination in a criminal proceeding. *See Gardner v. Broderick*, 392 U.S. 273 (1968). These constitutional protections extend to public employees even though they do not extend to employees in the private sector who have suffered like deprivations at the hands of their employers.

D. Because the reasoning of the Fifth Circuit in this case would also exempt from constitutional oversight conduct by government in its capacity as "proprietor," *see* p. 5, *supra*, the Fifth Circuit's decision is at odds with numerous other decisions of this Court which illustrate that government is bound to conform to constitutional requirements even when it performs functions that also are performed by private actors.

Thus, both private schools and public schools are involved in educating students,[3] but the Court has consistently and repeatedly held that public school officials are subject to constitutional constraints in their treatment of students that their counterparts in the private sector are not. *See, e.g., Brown v. Board of Education, supra*

[3] Indeed, at the time that the Fourteenth Amendment was adopted, public education was predominately a private enterprise, at least in large segments of the country. *See Brown v. Board of Education*, 347 U.S. 483, 489-90 (1954).

(equal protection clause); *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (equal protection clause); *Mississippi v. Hogan*, 458 U.S. 718 (1982) (equal protection clause); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (first amendment); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (first amendment); *Healy v. James*, 408 U.S. 169 (1972) (first amendment); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (first amendment); *Goss v. Lopez, supra* (procedural due process); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (procedural and substantive due process); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (fourth amendment).

The Court's decision in *New Jersey v. T.L.O., supra*, is particularly instructive in this regard. There the Court explicitly addressed an argument that the applicability of the Constitution—in that case the Fourth Amendment—turned on the capacity in which the state actor was functioning. Specifically, it was argued that the Fourth Amendment had no application to searches and seizures by public school officials because the Amendment applies only to the core governmental function of criminal law enforcement, and because the conduct of school officials in searching students partakes more of a "parental" than a "State" function. *See* 469 U.S. at 333-37. The Court rejected these arguments, concluding that the touchstone for application of the Fourth Amendment is simply the presence of " 'governmental action—that is, . . . the activities of sovereign authority.' " *Id.* at 335 (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). *Cf.* pp. 5-7, *supra*.

The same principle holds true in other fields of public endeavor that might be characterized as "proprietary" in nature. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) ("Because state action exists," the policies and practices of a public transit system with respect to advertising space are subject to scrutiny under the First Amendment); *United States v. Kokinda*, ——

U.S. ——, 110 S. Ct. 3115, 3119 (1990) (First Amendment applies to the decision of the United States Postal Service to restrict solicitation on postal premises); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurant operated under lease from municipality is subject to the strictures of the Fourteenth Amendment).

E. We do not suggest that it is *irrelevant* to constitutional analysis whether government has acted as "governor," "employer," or "proprietor." To the contrary, the context in which the government has acted often will be crucial in determining how the interests invoked by government in support of its conduct are to be assessed. Our point is simply that the government's status as employer or proprietor goes only to *the existence of a constitutional violation*—and not to the threshold question of the Constitution's applicability. *See, e.g., New Jersey v. T.L.O., supra*, 469 U.S. at 337 ("To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place."); *Cleveland Board of Education v. Loudermill, supra*, 470 U.S. at 541-43 (the guarantee of due process applies with full force to property interests in public employment; however, the question of what process is due is answered by "a balancing of the competing interests at stake," including "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination"); *O'Connor v. Ortega, supra*, 480 U.S. at 717 (public employees have legitimate Fourth Amendment privacy interests in being free from unreasonable searches and seizures by their employers; "[t]he operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official") (emphasis in original); *Rankin v. McPherson, supra*, 483 U.S. at 384 (in cases involving the discharge of public employees on the basis of their speech, a court must balance the competing interests at stake "in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment").[4]

[4] The manner in which the interests of government as employer or proprietor affect the constitutional analysis in a given case is well illustrated by two recent decisions of this Court: *National Treasury Employees Union v. Van Raab, supra*, which involved government *qua* employer, and *United States v. Kokinda, supra*, which involved government *qua* proprietor.

In both cases, the Court divided 5-4 on the question whether the plaintiff had made out a violation of the Constitution on the facts presented. In each case, this disagreement centered on the weight of the constitutional interests at stake and the counterweight of the government's asserted interests *as employer* or *as proprietor* in pursuing the challenged conduct. *Compare Von Raab*, 489 U.S. at 666-67 (mission of Custom Service would be compromised if it were required by Fourth Amendment to seek a search warrant before requiring employees to submit to random drug tests) *with id.* at 686 (Scalia, J., dissenting) (the interests asserted by the Custom Service in support of random drug testing are "feeble" and hence inadequate to justify the significant Fourth Amendment intrusion involved); *Kokinda*, 110 S. Ct. at 3122-23 (plurality opinion) (significant governmental interests in competing effectively in increasingly competitive mail service market justifies the infringement on First Amendment rights accomplished by ban on solicitation on postal premises) *with id.* at 3136-37 (Brennan, J., dissenting) (although governmental interest in preventing disruption of postal services is weighty, the government's restriction on solicitation is broader than necessary to serve that interest, thus creating an undue infringement of First Amendment rights).

In both cases, however, the Court was unanimous in its view that the Constitution provided the yardstick against which the government's conduct was to be measured. Thus, in *Von Raab*, the Court held that "[o]ur earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by

In sum, this Court's decisions leave no room for the Fifth Circuit's assertion that a constitutional claim—and hence a § 1983 action—can arise only when the government is acting in a uniquely "governmental" role, rather than in the capacity of an employer or proprietor. So long as state action of any kind is involved, *the Constitution* establishes the standard against which that state action must be judged.

II. TO STATE A CAUSE OF ACTION UNDER SECTION 1983 AGAINST A GOVERNMENTAL ENTITY FOR THE DEPRIVATION OF A RIGHT PROTECTED BY SUBSTANTIVE DUE PROCESS, A PLAINTIFF MUST ALLEGE THAT GOVERNMENT ITSELF HAS ARBITRARILY OR CAPRICIOUSLY (AND NOT NEGLIGENTLY) CAUSED THAT DEPRIVATION. PETITIONER HAS ADEQUATELY MADE THE NECESSARY ALLEGATIONS HERE.

A. The Fifth Circuit's approach may reflect a concern that not every act that would be regarded as a garden variety tort if committed by a private actor—such as

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the Government, even when the Government acts as an employer." 489 U.S. at 665. Similarly, in *Kokinda*, the Court held that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business . . . ." 110 S. Ct. at 3119; *see also id.* at 3131 n.4 (Brennan, J., dissenting) (The government may not escape the reach of the First Amendment by asserting that it acts only in a proprietary capacity; nor does "[t]he fact that the government is acting as an employer or as a proprietor . . . exempt it from the distinct requirements of the Equal Protection Clause, . . . or the Due Process Clause, . . . or the Commerce Clause, . . . or the Privileges and Immunities Clause of Article IV.") (citations omitted).

Of course, some constitutional guarantees are more absolute than others, and thus will yield, if at all, only to an unusually compelling governmental interest. *See, e.g., Personnel Administrator v. Feeney, supra*, 442 U.S. at 273 (although the states are entitled to "wide discretion in framing employee qualifications, . . . any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment").

simple negligence—be elevated to a wrong of *constitutional* dimension when committed by a state actor. That concern—which springs from the notion that the Framers of the Constitution generally had more pernicious acts of government in mind when they drafted that document, *see Daniels v. Williams*, 474 U.S. 327, 331-32 (1986)—surely is legitimate, but it is not adequately addressed by the Fifth Circuit's classification of governmental action; it exists even when government is acting in a "governmental" capacity, and is by no means unique to situations in which the government is acting in its capacity as employer or proprietor. For example, a police officer investigating criminal activity, or a prison official caring for involuntarily incarcerated inmates, or a welfare official distributing public benefits—all of whom might be said to be engaged in uniquely "governmental" activity of one form or another—are as capable in the course of their duties of committing acts of simple negligence as is government acting as an employer or proprietor. *See, e.g., Daniels, supra; Davidson v. Cannon*, 474 U.S. 344 (1986).

This being so, the proper focus in constitutional cases raising claims that sound in negligence is on the *degree of culpability* required of a state actor before a particular provision of the Constitution may be said to be violated; *not* on whether the conduct engaged in by the state actor can most appropriately be characterized as uniquely "governmental," "employment-related," or "proprietary" in nature. In other words, if (but only if) certain conduct by a state actor is sufficiently culpable to work a deprivation of *constitutional* magnitude, a claim for violation of the Constitution should lie under § 1983 without regard to the capacity in which that conduct has occurred.[5]

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[5] Indeed, this Court has held, in a case involving the government *qua* employer, that "[b]y the plain terms of § 1983, two—*and only two*—allegations are required in order to state a cause of action

The Court's decision in *Daniels*, *supra*,—relied on heavily by the Fifth Circuit in support of its novel approach to this case, *see* JA at 49—is, upon analysis, direct authority for the contrary approach outlined above. *Daniels* involved a § 1983 suit for damages by an inmate at a city jail who alleged that he was injured when he slipped on a pillow negligently left on the stairs by a correctional deputy stationed at the jail. The inmate contended that this negligent act by the state defendant had "deprived" him of liberty without due process of law within the meaning of the Fourteenth Amendment. *See* 474 U.S. at 328.

The Court rejected this contention on the ground that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Id.* (emphasis in original). The Court reasoned, based on the language and history of the Due Process Clause, that the Clause was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" and that "lack of due care" by a government official simply did not amount to such an arbitrary exercise of power. *Id.* at 331-32 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

The correctional deputy in *Daniels* was engaged in conduct—the supervision of inmates incarcerated pursuant

under that statute." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (emphasis added). Specifically, a § 1983 plaintiff must allege (1) "that some person has deprived him of a federal [constitutional or statutory] right;" and (2) "that the person who has deprived him of that right acted under color of state or territorial law." *Id.*; *accord, e.g., Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *West v. Atkins*, 487 U.S. 42, 48 (1988). Accordingly, where a § 1983 claim alleges that a state actor deprived the plaintiff of a constitutional right, the key inquiry in determining whether the action may proceed to judgment is whether the plaintiff has adequately alleged a violation of the Constitution. That, however, is the very inquiry that the Fifth Circuit pretermitted in dismissing petitioner's § 1983 claim.

to the criminal laws—that might be characterized as uniquely "governmental" in nature. The Court, however, attached no significance to this point; the only relevant issue was whether the deputy—concededly a state actor for § 1983 purposes—could be said to have *abused* the powers of his state office through an act of simple negligence. The Fifth Circuit misreads the Court's opinion in *Daniels* in extracting from that opinion the unwarranted principle that even when a state actor *has* abused the powers of his position in a manner violative of constitutional liberties, the right of a § 1983 plaintiff to invoke the protections of the Constitution depends on whether government has acted in a uniquely "governmental," "employment," or "proprietary" capacity.

B. Petitioner in this case does *not* allege that her husband was deprived of his life through the mere negligence of the City of Harker Heights, Texas. To the contrary, petitioner alleges in her complaint that the City *consciously* and with *deliberate indifference* to threats to the lives of its employees directed those employees to perform tasks known by the City to be hazardous without providing them adequate training and equipment. *See* JA at 4-9. At this stage in the proceedings, the issue squarely posed by these allegations is whether it is *inconceivable* that petitioner could prove *any set of facts* that would entitle her to relief under § 1983 and the Due Process Clause.[6] We submit that the Eighth Circuit in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), has—in circumstances indistinguishable from the case *sub judice*—properly applied this Court's precedents to hold that

[6] *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citing "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

such allegations *do* state a cause of action under § 1983 and the Due Process Clause.[7]

1. As a threshold matter, the *Ruge* court properly recognized that under this Court's precedents, a § 1983 claim for violation of the Due Process Clause will not lie based on allegations that "the state [has] simply commit[ted] a tort." 892 F.2d at 741-42. In this respect, the *Ruge* court's judgment is based directly on this Court's holding in *Daniels*, *supra*. *See also Davidson*, *supra*, 474 U.S. at 347.

Although the Court in *Daniels* had no occasion to consider what level of culpability *over and above mere negligence* is necessary to make out a violation of the substantive component of the Due Process Clause in a case such as this, the *Daniels* Court did observe that "'[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" 474 U.S. at 331 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). *See also*, *e.g.*, *Slochower v. Board of Higher Education*, *supra*, 350 U.S. at 559 (same); *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 640 ("the Due Process Clause of the Fourteenth Amendment requires that [state action] must not needlessly, arbitrarily, or capriciously impinge upon . . . a [person's] constitutional liberty"). Consistent with this position, the *Ruge* court concluded—properly we submit—that if the government were shown to have actively exposed its employees to the risk of death or serious injury by directing them to perform duties known by the government to be hazardous without even minimal warning or protection, such conduct would be sufficiently arbitrary and capricious to constitute a wrong of "constitutional dimensions." 892 F.2d at 742.

[7] The allegations of the plaintiff in *Ruge* were substantially similar to the allegations here. Thus, the plaintiff in *Ruge* alleged that the City of Bellevue, Nebraska had, in the conduct of its sewer department,

> formulated and adhered to a long standing policy of not shoring up the walls of ditches into which it sends its employees, that the City knew of the dangers of such conduct, that it continued to require its employees to work in such ditches, and that it intentionally failed to warn those employees of the dangers involved in such work. [892 F.2d at 740.]

Petitioner here has alleged a wrong no different in kind from that alleged in *Ruge*, and there is no basis under *Daniels*, *supra*, for the implication in the Fifth Circuit's opinion that such a wrong, if proved, would not offend the Constitution.

2. The *Ruge* court's holding on this issue is, moreover, in no way inconsistent with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as the Fifth Circuit also appeared to think. *See* JA at 51-52. The sole issue presented in *DeShaney* was whether the government had an affirmative duty under the Due Process Clause to protect a child against the dangers of "private violence" of which the government was aware, but which the government concededly "played no part in creating." 489 U.S. at 197. The Court answered this question in the negative, reasoning that the purpose of the Due Process Clause was "to protect the people *from the State*, not to ensure that the State protected them from each other." *Id.* at 196 (emphasis added).

In contrast, the municipal defendants in this case and in *Ruge* are alleged to have actively exposed their employees to known dangers of the government's own creation. More specifically, the municipal defendants in both cases are alleged to have *required* their employees to perform certain duties *that were under the direct control of the government*. The harm that befell the public employees in these cases is thus alleged to have been the direct and exclusive result of government as opposed to private misconduct. The *Ruge* court cited with approbation an earlier Eleventh Circuit case that draws this precise distinction:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action. *Cf. Bradberry v. Pinellas County*, 789 F.2d 1513, 1517 (11th Cir. 1986) (distinguishing between situations where a state *actively places someone in danger* and where the state fails to help someone already exposed to a risk not created by the governmental body, and holding that no liability under section 1983 arises in the latter situation). [892 F.2d at 741-42 (emphasis added).]

3. The *Ruge* court also properly recognized that when the defendant in a § 1983 suit is, as here, *a municipality*, it may not be enough to show that the plaintiff has suffered a wrong of "constitutional dimensions." Because § 1983 does not permit damages liability to be imposed on a municipality on a *respondeat superior* theory, a plaintiff seeking such relief must also show that the constitutional deprivation he or she has suffered is fairly attributable to "the municipality *itself*." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). *See Ruge*, 892 F.2d at 740-41 & nn.2, 6. "It is only when the 'execution of the government's policy or custom . . . inflicts the [constitutional] injury' that the municipality may be held liable under § 1983." *City of Canton*, 489 U.S. at 385 (quoting *Monell, supra*, 436 U.S. at 694). *Cf. Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989) (*prospective injunctive relief* can be awarded against municipality under § 1983 without proof of "policy or custom").

Petitioner has adequately alleged an unconstitutional municipal policy or custom here. According to petitioner, the City of Harker Heights, with knowledge that its employees were in obvious danger of being killed or seriously injured absent the proper training and equipment, consciously decided not to provide its employees with that training and equipment. JA at 4-9. Under *City of Canton, supra*, such a conscious decision by the City "may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable [under § 1983] if it actually causes injury." 489 U.S. at 390. *See also Ruge*, 892 F.2d at 741-42.

4. It is obvious from the foregoing that the burden of proof on a plaintiff in a case of this sort is a considerable one, but whether petitioner can meet that burden here is not the determinative question at this stage of the proceedings. Petitioner alleged that the City of Harker Heights has engaged in misconduct far more culpable than an ordinary tort and has, as a direct consequence of that misconduct, deprived petitioner's husband of the most precious right protected by the Constitution against infringement by the State: his life. We submit that these allegations state a cause of action under § 1983, and that petitioner should be allowed the opportunity to discover and proffer the requisite proof.

CONCLUSION

For the foregoing reasons the decision of the court below should be reversed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America [ATLA] is a voluntary national bar association whose approximately 65,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm, as well as those who stand accused of crimes.

The vindication of constitutional rights not only provides compensation for victims, but it also deters future violations by agents of the government. The scope of the statute primarily used to enforce constitutional rights is at issue in this case, and this Court's resolution of that issue will directly affect the ability of ATLA members to vindicate the constitutional rights of clients.

ATLA therefore respectfully submits this brief as amicus curiae. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

As a remedial legislation, 42 U.S.C. §1983 is to be construed generously in order to further its primary purpose of vindicating cherished constitutional guarantees.

To properly state a claim pursuant to 42 U.S.C. §1983, it is necessary to plead two, and only two, elements: that the defendant acted under color of law and that the plaintiff's constitutional rights were violated. The facts necessary to prove a constitutional violation vary significantly depending upon the nature of the alleged constitutional violation.

Regardless of the constitutional violation alleged, "abuse of government power" is not a separate and distinct element necessary to state a claim pursuant to 42 U.S.C. §1983.

Where a plaintiff alleges that a municipality violated a substantive Due Process right for failure to train employees, the degree of fault necessary to rise to the level of a constitutional violation is "deliberate indifference" on

the part of the municipality. A municipality's deliberate indifference to constitutional rights *is* an abuse of government power.

Governmental conduct may fall squarely within traditional tort law and still give rise to a constitutional violation. Overlapping state court remedies are generally irrelevant to the question of the existence of a cause of action under §1983.

The government need not act in a way that is essentially indistinguishable from a private employer in order to state a claim under §1983. Individuals do not lose constitutional rights merely because they work for the government instead of a private employer.

State law may create a liberty interest protected by the United States Constitution. The Texas Hazard Communication Act uses language of unmistakably mandatory character creating a substantive limitation on official discretion. A liberty interest recognized by the Due Process Clause of the United States Constitution is thereby created.

ARGUMENT

I. ABUSE OF GOVERNMENT POWER IS INFERRED WHEN A MUNICIPALITY DEMONSTRATES DELIBERATE INDIFFERENCE IN TRAINING EMPLOYEES.

A. A Claim Under 42 U.S.C. §1983 Must Allege Only That Plaintiff Was Deprived Of A Federal Right And That The Person Who Violated That Right Acted Under Color Of State Law.

Title 42 U.S.C. §1983 was enacted to aid in "the preservation of human liberty and human rights." *Owen v. City of Independence*, 445 U.S. 622, 636 (1980). Section 1983 reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." 445 U.S. at 639. As remedial legislation, §1983 is to be construed generously to further its primary purpose. *Id.* at 631-32; *Gomez v. Toledo*, 446 U.S. 635 (1980).

In *Gomez v. Toledo*, the Court ruled that nothing in the language of the statute or the legislative history of §1983 required the petitioner to affirmatively allege that a public official acted in bad faith in order to state a claim for relief. In so ruling, the Court explicitly held:

> [B]y the plain terms of §1983, two, and only two, allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of the federal right. Second, he must allege that the person who has deprived him of that right acted under color of state law or territorial law.

445 U.S. at 638; *See also Parratt v. Taylor*, 451 U.S. 527, 535 (1981)("The conduct complained of was committed by a person acting under color of state law" and that "this conduct deprived [petitioner] of rights, privileges, or immunities secured by the Constitution or laws of the United States").

As applied to the case at bar, petitioner is only required to allege that the respondent violated a federal constitutional right, and that it did so while acting under color of law. The court below, however, ruled explicitly to the contrary.

According to the Fifth Circuit, in addition to the constitutional deprivation element, there also exists a separate "abuse of government power" element which also must be satisfied. "We base our holding on the abuse of power standard, separate from the constitutional deprivation element or standard." *Collins v. City of Harker Heights, Texas*, 916 F.2d 284, 286 (5th Cir. 1990).

> In this Circuit, there is a separate standard that must also be satisfied - an abuse of government power. While this element is in many ways similar to, and often blends with other necessary elements of a §1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless.

Id. at 287.

Because the Fifth Circuit found no "abuse of government power," the court found it unnecessary to determine whether the respondent violated the petitioner's

constitutional rights.

> [O]ur holding is grounded in the abuse of power standard, which pertains to the decedent's relationship with the City - one of employer and employee, rather than one in which the city, as government, acted against the decedent, as governed. Therefore, it is not necessary to reach another of the standards, or elements, necessary for a §1983 action, whether there is a deprivation of a constitutional right.

Id.

In support of its position that §1983 requires "abuse of government power" as a separate and distinct element in addition to a constitutional violation, the Fifth Circuit relied most notably upon *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) and *de Jesus Benavides v. Santos*, 883 F.2d 385 (5th Cir. 1989). The Fifth Circuit also looked to *Rankin v. City of Wichita Falls*, 762 F.2d 444 (5th Cir. 1985); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); and *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986). Significantly, these cases were decided before *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), in which this Court made clear that "abuse of government power" does not consitute a separate element of a § 1983 claim.

The Fifth Circuit's understanding of §1983 is clearly in error. As already stated, plaintiff need only allege a violation of a constitutional right and that the right was violated by a person acting under color of law. *Gomez v. Toledo, supra*. Where a deliberate indifference in training is alleged, that conduct constitutes an abuse of government power and satisfies the constitutional deprivation element

necessary to state a claim under §1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

Harris is particularly helpful. This Court specifically considered the standard applicable for determining a municipality's liability for its failure to train its police officers. The abuse of government power standard is satisfied where government misconduct rises to the level of deliberate indifference to plaintiff's constitutional rights. Where government officials demonstrate a deliberate indifference, "such a shortcoming [may] be properly thought of as a city policy or custom that is actionable under §1983." 489 U.S. at 389. [1] A government policy of deliberate indifference to constitutional rights is abuse of government power of a constitutional dimension, and more than a state tort. *Id.*

> Consequently, while claims such as respondent's -- alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered -- are cognizable under §1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

489 U.S. at 392.

The court in *Harris* acknowledged the possibility that the need for training may be so obvious and the inadequacy

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[1] "Where a §1983 plaintiff can establish that the facts available to city policy makers put them on actual or constructive notice that the particular omission [in training] is substantially certain to result in the violation of constitutional rights of their citizens, the dictates of *Monell* are satisfied." (O'Connor J., concurring in part and dissenting in part); *Harris*, 109 S.Ct. at 1208.

so likely to result in constitutional violations, "that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. Under those circumstances, petitioner states a claim under §1983. *See also, Ruge v. City of Bellevue*, 892 F.2d 738, 742 (5th Cir. 1989) ("We deem a policy, if adopted and proven, that would show that a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act").

The Fifth Circuit attempted to distinguish *Harris* on the grounds that "it pertains to cases concerning use of governmental power on the governed." *Collins*, 916 F.2d at 287. However, nothing in *Harris* suggests that government employees should enjoy less constitutional protection than other persons. In many instances, a municipal employee enjoys constitutional protection only because his employer is the government. (*See* Section IC, below). According to *Harris*, municipalities are liable under §1983 only where "that city's failure to train reflects deliberate indifference to the constitutional rights of its *inhabitants*." 489 U.S. at 392 (emphasis added). Workers do not forfeit their status as inhabitants merely because the government is the employer.

The Fifth Circuit's reading of *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), is also misguided. The court found in *DeShaney* a ruling that even where all other elements of the §1983 claim are present (including a constitutional violation), not all injuries arising out of an association or relationship with the government give rise to a §1983 claim. *Collins*, 916 F.2d at 289.

This reading does violence to the plain language of *DeShaney*. This Court did not hold that despite a

constitutional violation, petitioner failed to state a claim under §1983. Rather, the *DeShaney* Court ruled that there existed no constitutional violation at all because the Due Process Clause did not "protect the life, liberty and property of its citizens against invasion by private actors." *DeShaney*, 109 S.Ct. at 1003. This Court clearly explained, "as a general matter, then, we conclude that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 1004.

Also, in *DeShaney* the Court expressly noted that the state did nothing "to render [the victim] more vulnerable to [known] dangers." 109 S.Ct. at 1006; *Gibson v. City of Chicago*, 916 F.2d 1510, 1519 n.19 (7th Cir. 1990).

In the case at bar, it is alleged that the City of Harker Heights sent Mr. Collins to work under conditions which it knew were deadly. It is alleged that the respondents' complete failure to train its employee to protect himself from known dangers constitutes deliberate indifference to fundamental Due Process rights. These allegations are distinguishable from those of *DeShaney*, and constitute an abuse of power stating a claim under §1983.

The Fifth Circuit's reliance upon *de Jesus* springs from the notion the that "one does not state a constitutional claim merely by alleging ordinary negligence...." 883 F.2d at 387 (citing *Rankin*, 762 F.2d at 447). Regrettably, the Court in *de Jesus* made no attempt to distinguish *Harris*.

Any reliance upon *Davidson v. Cannon*, 474 U.S. 344 (1986) or *Daniels v. Williams*, 474 U.S. 327 (1986) is also misplaced. In both instances, the Court simply held that abuse of government power could not be inferred when the

petitioner alleges that a municipal official was *merely negligent.*

Similarly, in *Daniels v. Williams*, 474 U.S. 327, 328 (1986), this Court considered an inmate's §1983 claim for damages for injuries allegedly sustained in a Richmond, Virginia jail when he slipped on a pail negligently left on a stairway by a sheriff's deputy. The court acknowledged that abuse of government power would be an element necessary to prove that the Due Process Clause of the constitution had been violated. However, the Court in *Daniels* only held that mere negligence by a municipality did not rise to the level of an abuse of power which would be constitutionally recognized.

> Far from an abuse of power, lack of due process, suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injuries caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries old principle of due process law.

Daniels v. Williams, 474 U.S. at 330.

In *Davidson v. Cannon*, 474 U.S. 344 (1986), this Court again considered a claim under §1983 alleging that a state official had been negligent by failing to protect plaintiff from another inmate. The Court in *Davidson* reiterated its holding in *Daniels* that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. *Davidson*, 474 U.S. at 346.

> Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious and respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the state must guarantee due care of its officials.

Id. at 670.

The result in *Davidson v. Cannon* would clearly have been different if the petitioner had alleged that the municipality acted with deliberate and callous indifference to federally protected rights.[2]

In the case at bar, petitioner has not alleged mere negligence. The petitioner's estate has alleged a deliberate indifference to the deceased's federally protected rights under the Due Process Clause. This allegation distinguishes it from both *Daniels* and *Davidson.*

B. Government Conduct May Fall Squarely Within Traditional Tort Law And Still Give Rise To A Constitutional Violation Actionable Under 42 U.S.C. §1983.

It appears that the availability of a state tort remedy, at least in part, explains the Fifth Circuit's ruling that plaintiff's factual allegations did not state a claim under §1983. *Collins v. City of Harker Heights, Texas*, 916 F.2d 284, 287-288 (5th Cir. 1990) (The constitution does not purport to supplant traditional tort law); *Daniels v.*

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[2] The district court in *Davidson* expressly found that the respondent did not act with deliberate and callous indifference. This finding was not challenged on appeal. *Davidson*, 474 U.S. at 347.

Williams, 474 U.S. 327, 330 (1986)("We have previously rejected reasoning that would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states."); *de Jesus Benavides v. Santos*, 833 F.2d 385, 388 (5th Cir. 1989) ("§1983 does not federalize tort law. While reckless or grossly negligent conduct...may cause injury..., a claim against the officials on that basis falls 'squarely within traditional state tort law'"); *Washington v. District of Columbia*, 802 F.2d 1478, 1480 (D.C. Cir. 1986) ("The Supreme Court has repeatedly warned that §1983 must not be used to duplicate state tort law on the federal level"); *Walker v. Rowe*, 791 F.2d 507, 511 (7th Cir. 1986)("the constitution does not duplicate duties of care in the common law of torts").

However, state common law torts and constitutional violations actionable under 42 U.S.C. §1983 are not mutually exclusive. The availability of a state tort remedy does not preclude a claim under §1983.

> Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that search and seizure violates the state's constitution or statues, and despite the fact that there are common law remedies for trespass and conversion.

Zinermon v. Burch, 494 U.S. 113, 130-31 (1990).

Where a plaintiff claims a violation of substantive Due Process, the court in *Zinermon* held explicitly held that "'a plaintiff, under *Monroe v. Pape*, may invoke §1983

regardless of any state tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 131.

In *Adams Fruit Co., Inc. v. Rabbett*, 110 S.Ct. 1384 (1990) the Court held that the exclusivity provisions in state worker compensation laws do not bar migrant workers from bringing a private action under the Migrant and Seasonal Agricultural Worker Protection Act; 29 U.S.C. § 1801 et seq. The Court specifically held that the existence of a federal right is not conditioned upon the unavailability of a state remedy:

> We likewise reject petitioner's contention that, where Congress authorizes a private right of action to vindicate a federal right we should assume that Congress has conditioned that right on the unavailability of a state remedy. Indeed, we have stated that "it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 603, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971). Congress may *choose* to establish state remedies as adequate alternatives to federal relief, but federal rights should be regarded as supplementing state-created rights unless otherwise indicated. (emphasis original).

Id. at 1389.

In the case at bar, plaintiff claims a violation of substantive Due Process in that the municipality acted with deliberate indifference by failing to train its employees to protect themselves against a known risk. Although these allegations clearly state a claim under state tort law, they

also state a claim under §1983. A substantive Due Process violation states a claim under §1983 "regardless of any state tort remedy that might be available." *Zinermon*, 494 U.S. at 131. While not all government conduct actionable under state tort law is also actionable under §1983 (negligence is the most conspicuous example), government conduct which may be actionable under state tort law is not automatically precluded under §1983. As already stated, state common law torts and constitutional violations actionable under §1983 are not mutually exclusive.

C. The Government Need Not Act In A Way Essentially Indistinguishable From A Private Employer In Order To State A Claim Under 42 U.S.C. §1983.

The Court below specifically focused upon the issue of whether it is the "alleged wrongful conduct by government - in its capacity as employer rather than as a governing authority - that deprives its employee of an alleged constitutional right give rise to a §1983 action." *Collins*, 916 F.2d at 286. According to the Fifth Circuit, §1983 requires that the government act in a way which is distinguishable from the role of a private employer. *Id.* at 288. [3]

Contrary to the Fifth Circuit's ruling, §1983 does not require conduct which is of "uniquely government character." Numerous §1983 claims arise within the

[3] *See Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986)("The constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment."); *McClary v. O'Hare*, 786 F.2d 83, 89 n.6 (2nd Cir. 1986)(conduct must be of a "uniquely government conduct").

employment context, and are distinguishable only because the government is the employer.

Clearly, within the private sector a search by an employer would not violate constitutional rights. However, the contrary is true when the search is conducted by a public employer. In *O'Connor v. Ortega*, 480 U.S. 709 (1987) the court considered a §1983 claim by a physician at a state hospital who alleged that hospital officials illegally searched his office and seized personal items from his desk and file cabinet. Generally, the court acknowledged that searches and seizures by government employers are subject to Fourth Amendment protections. *Id.* at 716-17. Significantly, the Court held that "[i]ndividuals do not lose Fourth amendment rights merely because they work for the government instead of a private employer." *Id.* at 717. This same reasoning is applicable in the case at bar. Individuals do not lose their substantive Due Process rights merely because they work for the government.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 1487 (1985), the Court held that the Due Process Clause requires a Pre-termination Hearing for all public employees with a protected property interest in employment. The failure to provide such a hearing is actionable under §1983. *Runge v. Dove*, 857 F.2d 469 (8th Cir. 1987)(Termination violated Due Process where the employer failed to give employee an opportunity to justify his conduct). In the private sector, however, at least non union employees are employees "at will" and have no Due Process rights at all. The only difference is the governmental nature of the employer.

Public employees enjoy First Amendment rights to express themselves on matters of public concern. A termination from employment based on First Amendment

rights may be actionable under §1983. *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 1056 (1987). In order to find a First Amendment violation the court must determine: 1) Whether the speech is entitled to constitutional protection; 2) whether, if protected, the speech was a substantial or a motivating factor in the action taken; and 3) whether the state could prove that the same action would have been taken in the absence of the protected activity. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1407 (9th Cir. 1988). Within the private sector, however, expressions of public concern may or may not be actionable depending upon the circumstances and state law. In no event, however, do expressions of public concern in the private sector rise to the level of a constitutional violation.

By way of further analogy, it is clear that sex discrimination or harassment by a public official violates the Equal Protection clause, and is therefore actionable under §1983. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988)("If a state official directly engaged in sexual harassment...he would, of course, be subject to §1983 liability"). [4] However, although the exact same conduct within the private sector would be actionable under state anti-discrimination statutes, the absence of any state action would preclude a constitutional violation.

[4] Accord: *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3rd Cir. 1990)("To bring a successful claim under §1983 for denial of equal protection, plaintiff's must prove the existence of purposeful discrimination"); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986)(Sex discrimination may form the basis of a claim under §1983, citing numerous cases).

II. THE TEXAS HAZARD COMMUNICATION ACT CREATES A LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE.

An additional issue before the Court is whether the Texas Hazard Communication Act creates a substantive Due Process liberty interest the violation of which is actionable under §1983.[5] In that regard, it is clear that "liberty interests protected by the Fourteenth Amendment may rise from two sources - the Due Process Clause itself and the laws of the states." *Hewitt v. Helms*, 459 U.S. 460, 465 (1983); *Mills v. Rogers*, 457 U.S. 291, 300 (1982)("State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). Independent from the substantive Due Process violation associated with the respondent's deliberate indifference in training, the State of Texas has created a substantive Due Process liberty interest by the enactment of the Texas Hazard Communication Act. "Stated simply, a state creates a protected interest by placing substantive limitations on official discretion." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459 (1989).

The adoption of mere procedural guidelines alone is insufficient to create the necessary liberty interest. *Helms*, 459 U.S. at 467. However, the necessary substantive limitations on official discretion is created by the use of "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will' or 'must' be employed." *Id.*

[5] This issue was not addressed in the court below. *See Collins*, 916 F.2d at 287 n. 3.

of an unmistakably mandatory character. Section 10(a) of the act provides that "[e]very employer *shall* provide, at least annually, an education and training program for employees using or handling hazardous chemicals....New or newly assigned employees *shall* be provided training before working with or in a work area containing hazardous chemicals." (Emphasis added). Clearly, this statute does more than create mere procedural guidelines. The mandatory language used by the statute allows for no discretion by municipal officials. The failure of the respondent to provide the mandated training and equipment has resulted in the deprivation of petitioner's liberty. This deprivation is actionable under §1983.

The petitioner has alleged that the respondent was deliberately indifferent to the training of its employees, and that this indifference was the proximate cause of petitioner's death. These allegations are sufficient to state a claim under 42 U.S.C. §1983. Petitioner need not allege abuse of government power as an element in addition to a constitutional violation. The availability of a state tort remedy does not preclude a §1983 claim. Private citizens do not lose their constitutional rights merely because they work for the government instead of a private employer.

CONCLUSION

For these reasons, Amicus urges this Court to reverse the judgment of the court below.

Respectfully Submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MYRA JO COLLINS,
Petitioner,

v.

CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Whether a municipality can be held liable under 42 U.S.C. § 1983 to a municipal employee for subjecting the employee or causing the employee to be subjected to a violation of federal rights when there has been no allegation that the municipality has abused its governmental authority.

2. Whether, under *City of Canton v. Harris*, 489 U.S. 378 (1989), a municipality can be held liable under Section 1983 for acting with "deliberate indifference" to its employee when there is no allegation that any municipal employee violated the Constitution.

3. Whether the Due Process Clause of the Fourteenth Amendment obligates municipal governments affirmatively to ensure their employees' safety.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The questions presented in this case will have a substantial impact on local governments' exposure to federal damages claims under 42 U.S.C. § 1983 for physical injuries incurred by their employees in the workplace.

In addition to the obligations and responsibilities imposed upon local governments pursuant to state law, petitioner is seeking to establish an affirmative and costly obligation under Section 1983 and the United States Constitution to ensure "safe" working conditions for municipal employees. This case therefore presents important issues concerning the scope of municipalities' affirmative duties under federal law. Because this Court's decision will have a direct impact on matters of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner seeks to transform an ordinary tort claim into a federal constitutional case merely because the defendant happens to be a local government. Petitioner's husband, an employee of the City of Harker Heights, died after being exposed to poisonous sewer gases while on the job. Having successfully pursued her state law remedies, petitioner filed a complaint under 42 U.S.C. § 1983, alleging that the City had violated her husband's substantive due process rights to life and liberty. The court of appeals affirmed the dismissal of petitioner's claim on the grounds that her allegations failed to state a claim under Section 1983. This Court should affirm the judgment of the court of appeals on any of three separate grounds.

I.

Section 1983 imposes liability upon a state actor who "subjects or causes to be subjected" another person to a deprivation of federally protected rights. In ordinary usage, the phrase "subjects or causes to be subjected" implies the exercise of coercion or force characteristic of the relationship between government and the governed, rather

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

than the consensual relationship between employer and employee. Furthermore, the legislative history demonstrates that Congress intended Section 1983 to reach instances in which a State actively denies or deliberately allows others to trample upon individual rights, not to impose affirmative obligations on the States. In accordance with this congressional intent, this Court has consistently described Section 1983 as addressing abuses of *governmental* power. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Because the City in this case was acting as an employer and not as a government, it is not subject to liability under Section 1983.

II.

Petitioner's allegations are insufficient to impose liability upon a municipality under Section 1983. This Court has held that a city is liable for constitutional torts in either of two situations, *viz.*, the city has an unconstitutional policy that is implemented by an employee, or an employee acts unconstitutionally and the city has taken action as a result of which it must bear responsibility for that unconstitutional act. *Compare Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) *with City of Canton v. Harris*, 489 U.S. 378 (1989). There is no allegation in this case that Harker Heights has any unconstitutional policy or custom to expose its employees to physical injury on the job. Nor does petitioner allege that any employee of Harker Heights committed a violation of decedent's constitutional rights for which the City could be held responsible. Accordingly, the complaint, which seeks relief exclusively against the municipality, was properly dismissed.

III.

The complaint does not state a violation of an underlying federal constitutional or statutory right, as required in a Section 1983 claim. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). In general, the Due Process Clause only

forbids the States from actively interfering with guaranteed personal liberties. It does not ordinarily require a State to provide affirmative protective services to any individual, even if the State is aware of danger to that individual. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). Any affirmative obligation imposed by the Constitution is strictly limited to cases where "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Id.* at 200. The employment relationship is not comparable to involuntary custody. Because the City did not "so restrain[] [Collins'] liberty that it render[ed] him unable to care for himself," it was under no constitutional obligation to provide him with affirmative protective services. *Id.*

The City was also under no constitutional obligation arising out of the Texas Hazard Communication Act, Tex. Rev. Civ. Stat. Ann. art. 5182b (West 1987).[2] Although this Court has in some cases found state statutes to create interests that are protected by procedural due process, it has never extended the more restrictive interest. In addition, no case has found a protected interest to arise out of any statute of general applicability to private parties as well as to the State. In this case, petitioner asks the Court to infer a substantive due process right to affirmative benefits from a statute of general applicability. There is no basis for the Court to infer such a right in this case.

[2] The Texas Hazard Communication Act, Tex. Rev. Civ. Stat. Ann. art. 5182b was subsequently recodified as Tex. Health & Safety Code Ann. § 502.001, *et seq.* (West 1991). Citations in this brief are located in the Appendix to Petitioner's Brief at A2-A18.

ARGUMENT

The court of appeals held that the alleged failure of a municipal government adequately to protect its employee from an ordinary hazard of employment does not give rise to a cause of action under 42 U.S.C. § 1983. This holding is unquestionably correct. There is simply no reason to permit a Section 1983 claim alleging a substantive due process violation to proceed against a city any time an individual employee is injured within the scope of his employment. That is not what either Section 1983 or the Due Process Clause was intended to accomplish. Accordingly, the court of appeals correctly held that Section 1983 may be invoked only when there is an allegation of abuse of governmental authority.

The fundamental principle that Section 1983 may be invoked by a municipal employee plaintiff only when the government defendant has abused its governmental power is supported by both the language and the legislative history of Section 1983. First, it can fairly be inferred from the statutory requirement that the government must "subject[] or cause[] to be subjected" an individual to a deprivation of a federal right in order to incur liability under Section 1983. Moreover, the legislative history demonstrates that when Congress enacted Section 1983, it intended not to impose affirmative duties upon governmental actors. This construction of Section 1983 is also supported by the opinions of this Court.

If, however, the Court declines to give this reading to Section 1983, the judgment of the court of appeals should nonetheless be affirmed. The complaint does not state an adequate basis for municipal liability under *City of Canton v. Harris*, 489 U.S. 378 (1989), and, more fundamentally, does not allege an underlying violation of the Due Process Clause. It does not allege that the City did anything to deprive the decedent of his life. Instead, it alleges that the City failed to fulfill an affirmative duty to protect the

decedent's personal safety and security while on the job. Outside of the context of confinement by the State, however, the Due Process Clause does not impose affirmative duties on municipalities, but only prohibits them from *depriving* individuals of their life, liberty or property.

The conclusion that there is no municipal liability in this case is of the utmost importance to *amici*. Whether the Court reaches that conclusion on the basis of the statute or the Constitution itself is less important than that the Court reach the correct outcome—failure of a municipal government to prevent its employees from being injured on the job is not actionable under federal law.

I. PETITIONER'S COMPLAINT DOES NOT ALLEGE A VIOLATION OF SECTION 1983.

A. The Language And History Of Section 1983 Demonstrate That It Is Limited To Cases Where The State Actor Has Abused Governmental Power.

Section 1983 provides that "[e]very person who, under color of [law], . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. In its ordinary usage, the phrase "subjects or causes to be subjected" implies an element of coercion or exercise of force that is absent from consensual or contractual relationships, including employment relationships. Thus, a contemporary source defined "subjection" as follows: "The *obligation* of one or more persons to act at the discretion or according to the judgment and will of others." 2 Bouvier's Law Dictionary 553 (11th ed. 1865) (emphasis added).[3]

[3] Subjection was separated into two categories: private subjection, such as that of parents over children; and public subjection, of government over the citizenry. 2 Bouvier's Law Dictionary 553 (11th ed. 1865).

Section 1983 was enacted by Congress in 1871 as part of the Ku Klux Klan Act. The Act was a direct response to the "lawless conditions" of the Reconstruction South, *Monroe v. Pape*, 365 U.S. 167, 174 (1961), in which vigilante groups frequently violated the constitutional rights of Union sympathizers and the recently freed slaves. State and local officials made such abuses possible by their tacit approval and their unwillingness to enforce relevant state laws. *See id.* at 176 ("The outrages committed upon loyal men [in Virginia] are under the forms of law.") (quoting Rep. Porter); *id.* at 230-31 n.46 (Frankfurter, J., dissenting) (describing Southern states' "systematic failure to make arrests, to put on trial, to convict, or to punish offenders").

Section 1983 was intended to eliminate state-sanctioned violence and abuse of power and provide a federal forum and cause of action to citizens aggrieved thereby. *Id.* at 237 (Frankfurter, J., dissenting). Although the reach of Section 1983 was meant to be broad, Congress declined to adopt the Sherman Amendment, which would have imposed upon state and local governments an affirmative obligation to keep the peace. *Monell v. Department of Social Servs.*, 436 U.S. 658, 679 (1978). *See id.* at 679-80 ("But the enforcing a [sic] liability, existing by . . . State law, in the courts, is a very widely different thing from devolving a new duty or liability upon [the States] by the national Government.") (quoting Rep. Poland). Congress also was concerned that Section 1983 not prevent state actors from "exercising 'necessary and customsary functions.'" *Owen v. City of Independence*, 445 U.S. 622, 672 (1980) (Powell, J., dissenting) (quoting Rep. Kerr). *See Monell*, 436 U.S. at 678 (congressional concern that "the Nation could not impose duties on state officers since that might impede States in their legitimate activities").

Consistent with the language and legislative history of the statute, this Court often has spoken of Section 1983 as targeted at the abuse of governmental authority. For

example, in *Monroe* the Court described Section 1983 liability as addressing "an official's abuse of his position." 365 U.S. at 172. In his concurrence in *Parratt v. Taylor*, 451 U.S. 527 (1981), Justice Powell similarly explained that "[Section 1983] was enacted to deter real *abuses* by state officials in the exercise of governmental powers." *Id.* at 549 (Powell, J., concurring) (emphasis in original). *See also Owen*, 445 U.S. at 657 (under Section 1983, "[t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated"); *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978) (purpose of Section 1983 was "prevention of abuses of power"); *Paul v. Davis*, 424 U.S. 693, 717 (1976) (Brennan, J., dissenting) (("The essential element of this type of § 1983 action is *abuse* of his *official position*") (emphasis in original) (footnote omitted)).

Given the legislative history and judicial interpretation of Section 1983, the language "subjects or causes to be subjected" does not encompass a claim by an employee injured on the job by an ordinary hazard of employment. The City of Harker Heights did not "subject" Collins to the loss of his life or liberty by the use of coercion or force. Nor did the City willfully cause Collins to be subjected to such abuse at the hands of another person. At most, petitioner alleges that respondent failed to take sufficient steps to protect Collins from the ordinary hazards he encountered on the job. To impose federal liability under such circumstances would be to create the type of expansive affirmative duty that Congress intended to avoid, rather than enforcing the States' obligation not to subject individuals to deprivations of their fundamental constitutional rights.

For these reasons, the court of appeals was correct when it held that Section 1983 claims by municipal employees are limited to circumstances involving abuse of governmental power. Under the Fifth Circuit's holding,

Section 1983 applies only where the government *qua* government wrongfully "subjects" a person to constitutional injury. The requirement of an abuse of governmental authority forecloses claims—such as this one—where the injury is allegedly attributable to a municipal government *solely* because the injured person was acting as a municipal employee at the time of the injury.

B. The Requirement Of Abuse Of Governmental Power Will Properly Restrict The Sweep Of Section 1983.

Applying Section 1983 in the circumstances of this case would constitutionalize many claims that otherwise would be the exclusive subject of state tort and workers' compensation laws. This Court consistently has dismissed such efforts to "federalize" state law. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Court rejected an interpretation of the Due Process Clause that would create "a right to be free of injury wherever the State may be characterized as the tortfeasor [and] make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *See also Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law' [for which remedy] must be sought in state court under traditional tort-law principles"). As the Court recently reiterated, "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

The attractiveness of petitioner's legal theory to future potential plaintiffs is obvious—virtually any workplace injury can be characterized as attributable to inadequate training or supervision. Once this minimal pleading hurdle is overcome, the plaintiff gains the benefits of ac-

cess to federal court as a Section 1983 claimant, including broad discovery rights, the right to have damages assessed by a jury, and the right to recover attorneys' fees under 42 U.S.C. § 1988. While municipalities will bear substantial litigation costs and risks, pursuit of a Section 1983 remedy is risk-free for the plaintiff: even if the plaintiff does not prevail on his due process/Section 1983 claim, he, like petitioner, retains all of his state common law, statutory, and administrative remedies.

If local governments are subjected to open-ended damages claims (including attorneys' fees) under Section 1983 for every work-related injury incurred by a municipal employee, federal law will improperly place them at a competitive disadvantage in relation to private employers operating in the same spheres, such as education and mass transit. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("when acting as proprietors, States should similarly share existing freedoms from federal constraints [as those enjoyed by private actors]"). Furthermore, in an era of tight fiscal resources, local governments would be compelled to reduce essential services in order to defend, compromise, or pay judgments in personal injury suits brought by public employees under Section 1983.

Under the theory of Section 1983/due process liability advocated by petitioner, every injury to a municipal employee that can be alleged, in hindsight, to be attributable to inadequate training or safety procedures will give rise to a federal claim. Such an approach would transform Section 1983 into the "font of tort law" against which this Court has warned. *Paul*, 424 U.S. at 701. The Court previously has rejected similar efforts to expand Section 1983 beyond its intended reach, and this case requires the Court to do so again.

II. PETITIONER'S COMPLAINT FAILS TO STATE A CLAIM OF MUNICIPAL LIABILITY UNDER SECTION 1983.

Petitioner's complaint does not seek to impose liability upon any individual government actor; instead, it is aimed exclusively at the City of Harker Heights. Even if petitioner's allegations were sufficient to state a claim under Section 1983 against an individual government actor despite the absence of any claim of abuse of governmental authority, they clearly are insufficient to state a claim directly against the respondent City.

It is well settled that a municipality cannot be held liable under Section 1983 on a theory of *respondeat superior*. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-94 (1978). Instead, municipalities are liable "only when the 'execution of the government's policy or custom . . . inflicts the injury.'" *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (quoting *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting)).

This Court has recognized two types of claims against local governments under Section 1983, neither of which is stated by petitioner. *First*, Section 1983 liability can be imposed upon a city if it has adopted a policy or custom that is itself unconstitutional and that is implemented by one of its employees. Thus, for instance, in *Monell* the city council had adopted an unconstitutional policy of compelling pregnant employees to take unpaid leaves of absence. The plaintiff's employment had been terminated by a supervisor who implemented that policy. 436 U.S. at 661-62. Similarly, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 473 (1986), the plaintiff was arrested by police officers implementing a policy of the County Attorney that violated the Fourth Amendment.

In this case, petitioner does not allege that the City of Harker Heights has a policy or custom of injuring its employees. There is no claim that decedent was sent into

the sewer by his supervisor in furtherance of a deliberate governmental choice to cause him bodily injury. Indeed, any such allegation would be absurd on its face.

Second, the Court held in *Canton* that a municipality sometimes can be liable under Section 1983 even when its policy is not itself unconstitutional. While Canton's policy of providing detainees with medical care was unquestionably consistent with the Constitution, *see* 489 U.S. at 386-87, this did not end the inquiry. Instead, the Court held "that there are *limited circumstances* in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *Id.* at 387 (emphasis added). But in defining those circumstances, the Court held plainly that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 389.

The logic of the holding in *Canton* is that, when a city itself does not have a policy that is unconstitutional, it will nonetheless be held accountable for the unconstitutional acts of its employees only when its deliberate choice not to train them "causes" an employee to violate *another's* constitutional rights. The city's liability is derivative. There must be an unconstitutional act committed by an employee of the city underlying the city's liability. And that act must in turn have been committed with the requisite scienter to establish a constitutional violation. *See Canton*, 489 U.S. at 388 n.8.

Petitioner errs by conflating the "deliberate indifference" standard for municipal liability identified in *Canton* with the similar constitutional requirement of scienter under the Due Process Clause. Thus, for instance, in a case where a police officer has shot and killed an individual, there is no due process violation if the officer acted negligently because a negligent act does not constitute a deprivation of due process. Accordingly, a city would not be liable under Section 1983 even if it had acted with

deliberate indifference in training the officer because there still would be no underyling constitutional violation.

Thus, under *Canton*, petitioner's Section 1983 claim against Harker Heights must include both an averment that a government employee violated the Constitution *and* a separate allegation of an intentional or deliberately indifferent policy or custom pursuant to which the City is responsible for that violation. Petitioner has alleged municipal indifference, but she fails to allege any action by a municipal employee that violated her husband's constitutional rights.[4] Because both allegations are required under Section 1983 as interpreted in *Canton*, this failure requires the complaint to be dismissed.

III. PETITIONER'S COMPLAINT DOES NOT ALLEGE THE DEPRIVATION OF ANY CONSTITUTIONAL RIGHT.

Even if this Court does not accept the analysis of Section 1983 advanced by *amici*, it should still affirm the dismissal of petitioner's complaint. The deprivation of a constitutional or federal statutory right is an essential element of a Section 1983 claim. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). Petitioner's attempt to frame her personal injury claim as a denial of due process is fundamentally flawed for the simple reason that the Due Process Clause is neither a substitute for tort law nor a charter of positive liberties that can be used to secure entitlements that the legislative branch has not seen fit

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[4] Moreover, petitioner fails to allege that anyone in the City of Harker Heights deliberately chose not to train Mr. Collins' supervisor and that this failure caused Mr. Collins' injury. Thus, the allegations fail to identify any municipal "act" upon which to impose liability. This absence of any allegation concerning any decision by a policymaker is fatal to petitioner's claim. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (a plaintiff cannot "establish municipal liability without submitting proof of a single action taken by a municipal policymaker").

to provide—such as a guarantee of a work environment without hazard.

A. The Failure Of A City To Take Affirmative Steps To Ensure Its Employee's Safety Does Not Constitute A Deprivation Of Life Or Liberty Without Due Process.

The Due Process Clause protects "liberty interests," including an individual's right to be free from the State's unjustified intrusions on personal security, from state deprivation. *See Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Petitioner seeks to expand that right to impose upon municipalities an obligation affirmatively to guarantee their employees' freedom "from unreasonable risks to . . . life or personal security in the workplace." Pet. Br. 16. The Due Process Clause, however, is a *restraint* on the State's power to act. The liberty interest that it creates is a negative liberty—the right to be free from state interference.[5] Thus, the Clause neither confers a guarantee of a specified level of personal safety nor creates an individual right to the limited resources of government—even where access to those resources is necessary to secure a liberty or property interest which due process protects from active state interference. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989).

This Court consistently has rejected arguments that the Fourteenth Amendment affirmatively guarantees access to such rudimentary benefits as education, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), housing, *Lindsey v. Normet*, 405 U.S. 56 (1972), or welfare assistance, *Dandridge v. Williams* 397 U.S. 471 (1970). Indeed, the Constitution does not require state or local governments to provide any services or benefits. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)

[5] The Due Process Clause of the Fourteenth Amendment provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border").

The Court recently reaffirmed this fundamental limitation on the contours of the Due Process Clause in *DeShaney*. That case involved the assertion under Section 1983 of a substantive due process claim of a minor, Joshua DeShaney, who had been severely beaten by his father. Joshua sued the county for the failure of its social workers promptly to intervene to protect him after becoming aware of the father's violent conduct. Although the Court agreed that the failure of the social workers or "the State" to take affirmative steps to protect the child had led to tragic results and may have been actionable under state law, *see* 489 U.S. at 202-03, it held that the failure to act did not implicate the Due Process Clause. "If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196-97.

The *DeShaney* Court explained that failure to take affirmative steps to prevent injury to a protected liberty interest does not give rise to a "deprivation" of due process because the Due Process Clause

> is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. at 195.[6] "While the State may have been aware of the dangers that Joshua faced in the free world, it played

[6] The history of the Due Process Clause likewise does not "support such an expansive reading of the constitutional text. Like its

no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. As long as the State "placed him in no worse position than that in which he would have been had it not acted at all," the state was not constitutionally liable for his injuries because "the State had no constitutional duty to protect Joshua." *Id.*

The due process claim in this case, like the claim in *DeShaney*, rests entirely on the failure of local government to take affirmative steps to protect a person who suffered serious physical injury. Pet. Br. 4-5 (City's failure "to train" and "to require [adequate] safety equipment to be on hand or used at the job site were all the cause of the . . . deprivation of . . . constitutional rights"). The only fair reading of the complaint is that it alleges that the City failed to protect the decedent from a risk of physical harm, which was also the core allegation in *DeShaney*. Because the municipality's failure to act in these circumstances cannot constitute a deprivation of a protected due process interest, the court of appeals properly affirmed the dismissal of petitioner's complaint.

B. The Existence Of An Employment Relationship Does Not Expand The City's Constitutional Obligations Under The Due Process Clause.

Petitioner attempts to distinguish *DeShaney* and related precedents by asserting that "decedent entered the sewer line in which he died *as part of his job* and at the instance of the City and its supervisors. . . . Thus his injury was caused by acts performed under color of state law, and no efficient private actor intervened." Pet. Br. 22 (emphasis added). In other words, petitioner argues that the fact that Collins was acting within the scope of his municipal employment is sufficient to "allege[] affirmative actions . . . under color of state law that directly and proximately caused decedent's death, in violation of his Due Process rights to life, liberty and personal security." *Id.* at 21-22.

Under petitioner's theory, *every* on-the-job injury to a municipal employee would constitute a "deprivation" of due process—regardless of any affirmative conduct by a state actor—because the injury would be "caused" in some sense by the fact of employment. As petitioner puts it, if Collins were not employed by the City he would not have "entered the sewer line in which he died as part of his job. . . ." Pet. Br. 22. Petitioner thus argues that municipal employment creates an affirmative obligation on the part of the municipal government to ensure the employee's safety, *i.e.*, that "the government employer owes its employees [a] substantive due process obligation to warn, train, supervise and equip them. . . ." *Id.* at 32. This argument is erroneous.

Affirmative due process obligations arise in the limited circumstance where state action has eliminated an individual's recourse to self-help, principally in cases involving detainees, inmates, and the involuntarily committed. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the State has a duty to provide adequate medical treatment to incarcerated prisoners since "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Id.* at 103. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court extended the same reasoning to involuntarily committed mental patients, holding that the Due Process Clause imposed on the State an "unquestioned duty to provide reasonable safety for all residents and personnel. . . ." *Id.* at 324. *See also City of Revere v. Massachusetts Gen. Hosp.*, 463

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counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney*, 489 U.S. at 195-96 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

U.S. 239, 244 (1983) (city may have substantive due process obligation to a detainee in police custody).

As the Court explained in *DeShaney*, the "rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." 489 U.S. at 200. The Court emphasized, however, that the circumstances in which such an "affirmative duty" would be applicable were extremely narrow:

> The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [the individual's] freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. (citation omitted). In this case, the City's employment of Collins did not so restrain his liberty that it "render[ed] him unable to care for himself." Accordingly, that act of employment did not, as a matter of substantive due process, create any affirmative obligation to ensure his personal safety.[7]

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[7] The *DeShaney* Court rejected efforts to extend the imposition of affirmative duties under the Due Process Clause to situations where the individual remains at liberty to remove himself from danger. *See* 489 U.S. at 199-200 ("[*Estelle* and *Youngberg*] afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being").

Moreover, *DeShaney* makes clear that the existence of danger and the inability of the individual to protect himself is not enough to impose affirmative duties upon the State. Obviously, Joshua was placed in an inherently dangerous situation by being in the custody of his father, and as a minor he lacked any practical means of protecting himself. But this Court held that these facts alone were insufficient to demonstrate that the local government had deprived Joshua of due process by its failure to protect him. *DeShaney* defeats petitioner's argument that there is a substantive due process right to a hazard-free workplace. *See also Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir.) ("The constitution no more assures a safe job than it does a job with a generous salary"), *cert. denied*, 479 U.S. 994 (1986); *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) ("We have found no cases holding that [a government] employee's right to a safe workplace is secured by anything other than the state law of tort").

This is not to say, as petitioner mischaracterizes the Fifth Circuit's holding, that the employer-employee relationship can *never* give rise to a violation of due process protections. Pet. Br. 27-29. As this Court frequently has held, a State cannot use the employment relationship as an instrument for improper interference with its employee's enjoyment of independently conferred rights. *See, e.g., Rutan v. Republican Party*, 110 S. Ct. 2729 (1990) (First Amendment right to free expression); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (Fourth Amendment protection from unreasonable search and seizure). Similarly, the State may not, without appropriate procedures, affirmatively interfere with a protected interest in employment that it has created. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*,

408 U.S. 593 (1972). However, there is neither precedent in this Court's holdings nor logical support for the proposition that the employment relationship in itself imposes on the State any due process obligation to confer specific benefits, including a particular level of safety, upon its employees.

C. The Texas Hazard Communication Act Does Not Expand The City's Constitutional Obligations Under The Due Process Clause.

Petitioner argues that even if the Due Process Clause does not independently obligate the City to ensure Collins' safety, the Texas Hazard Communication Act confers upon Collins a liberty interest in specific warning, training, and safety measures, the denial of which constituted a deprivation of due process. This argument must fail for two reasons. First, the Act plainly does not cover Collins' situation. Second, even if the Act did require the City to undertake certain measures, that statutory requirement would not give rise to a substantive due process right.

1. *The Act Does Not Protect Workers In Collins' Position.*

Petitioner argues that the Act broadly "protects workers from hazardous chemicals, such as sewer gas." Pet. Br. 45. The plain language of the Act, however, demonstrates that it addresses the purposeful "use" or "handling" of chemicals, not merely passive or chance contact such as was experienced by Collins.

For example, petitioner relies on the final sentence of Section 10(a) of the Act, which requires training of employees "before working with or in a work area containing hazardous chemicals." The first sentence of the same section makes clear, however, that the training at issue was intended "for employees using or handling hazardous chemicals." Because Collins neither "used" nor "handled" the sewer gases to which he was exposed,

he was not "working with" those gases within the plain meaning of the statute. Similarly, under Section 10(b) of the Act the principal feature of the required training program is "information on interpreting labels and [documents containing chemical hazard and safe handling information]."[8] In fact, most of the Act's substantive provisions relate to required listing, labeling, and provision of information about chemicals used, stored, or purchased by employers. *See* Sections 6, 7, 8, 9. These provisions are plainly inapplicable to a chemical such as sewer gas, which is not packaged and labeled in normal use.

In short, the Act as a whole makes sense only as applied to chemicals provided or stored by an employer for deliberate use by employees. It has no application to employees such as Collins who may encounter atmospheric hazardous gases in the course of their duties.

2. *The Act Does Not Create A Protected Interest Under The Due Process Clause.*

Even if the Act could be interpreted to apply to Collins, the Act still would not create a protected interest under the Due Process Clause. *DeShaney* did not reach the question whether a statute promising state protective services to an individual created "an entitlement which would enjoy due process protection against state deprivation." 489 U.S. at 195 n.2. This case demonstrates why statutes of this sort ordinarily should not be considered to create substantive due process rights. Furthermore, even if under some circumstances there could be a substantive due process right to protective services conferred

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[8] The required training program also includes information on the "safe handling of hazardous chemicals *used* by the employees" and on "protective equipment . . . with respect to the hazardous chemicals *used* by the employees." Act, Section 10(b) (emphasis added).

by statute, the general provisions of the statute at issue here clearly create no such right.

Petitioner argues that the Act confers upon municipal employees a "right" to training and other safety measures, Act, Section 15, and that the "right" to these safety measures is therefore a protected liberty interest which the Due Process Clause absolutely precludes the City from denying. Petitioner's assertion differs in several significant respects from prior cases in which this Court has found state statutes to create protected interests under the Due Process Clause.

At the outset, the constitutional protection for which petitioner argues is not procedural but substantive due process. Although the procedural and substantive due process doctrines derive from the same constitutional text, they serve different purposes. Procedural due process "promotes fairness" in government decisions, whereas substantive due process "prevent[s] governmental power from being 'used for purposes of oppression.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Thus, this Court's decisions affording procedural due process protection to state-created liberty and property interests promote the constitutional concern that state and local governments utilize fundamentally fair procedures in deciding whether to deny interests or "rights" in which the State has created an expectation. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). However, as a matter of substantive due process, the decision to withdraw—or failure to provide—a benefit or interest created solely as a matter of state law cannot be deemed an act of "oppression." It is one thing to say, as a matter of procedural due process, that a state-created interest cannot be withdrawn unfairly or arbitrarily, and it is quite another to say that

such an interest cannot be withdrawn at all.[9] For this reason, state-created liberty or property interests ordinarily do not and should not merit substantive due process protection.

Furthermore, even if substantive due process might under some circumstances impose an absolute constitutional constraint on the deprivation of some state-created liberty or property interests, application of such a doctrine is inappropriate in this case, where the "liberty interest" claimed is not a right to be free from governmental interference but a right to affirmative governmental assistance (*i.e.*, a right to a certain level of safety). The difference between a statute protecting the individual from state action and a statute requiring the State to protect the individual is a difference in kind, not degree. As discussed *supra*, pp. 14-18, except in the custodial context, due process traditionally has been implicated only by state *deprivation* of protected interests. For this reason, a statute that mandates government services ordinarily should not be presumed to create an interest protected by substantive due process.

Another reason that the Act does not create a protected liberty interest is that the Act is not narrowly drawn to mandate the provision of specific benefits or protections by the State and its subdivisions, but is applicable to public and private employers alike. In every case in which this Court has found a state statute to confer due process rights, the statute has specifically been designed to govern the relationship between the State and a defined group of individuals, in most cases either state prisoners

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[9] Obviously, a decision that a state-created intereset or right is subject to substantive due process protection has a far greater impact than a holding that the same interest is subject to procedural due process protection. Fundamental principles of federalism counsel that this Court be extremely reluctant to find that the States, by creating statutory "entitlements," have as a constitutional matter placed themselves and all of their subdivisions in a rigid position where they cannot under any circumstances deny these benefits.

or state employees. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (statute governing right of civil servants to continued employment); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979) (statute governing right of prisoners to parole). In such instances, it may be reasonable to assume that the statute was intended to create a private interest against the State that is subject to consitutional protection.

Where, however, as here, the statute governs primarily relations among private parties, and only incidentally reaches the State and its subdivisions, the more reasonable assumption is that the legislature intended to put relations between individuals and the State on the same footing as those between private parties. Clearly, there is no federal constitutional interest involved in enforcement of an employee's "rights" under the Act against a private employer. The legislature's simple act of subjecting the City to the same strictures as a private employer should not therefore be assumed to create a federal constitutional right against the City. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("[m]ere violation of a state statute does not infringe the federal Constitution"); *Paul v. Davis*, 424 U.S. 693, 700 (1976).[10]

In order to decide this case, it is not necessary for this Court to hold that any one of the factors distinguishing petitioner's claim from the precedents she cites in itself defeats her due process claim, although there are strong arguments for a bright-line rule. Rather, the Court need only decide that it will not infer a substantive due process

[10] This analysis is not inconsistent with the case law holding that once a State has created a due process interest, the procedural protections to be afforded that interest must be determined by federal law. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). In this instance, the Texas statute is not being used to define the procedural protections which the City must afford. To the contrary, it is used to argue whether Texas has created any substantive right at all, a function which all the cases acknowledge is the prerogative of the State.

right to a governmental service mandated by a statute of general applicability to private parties as well as to the State, especially where state law provides a remedy to a person who is injured by the state or local government's failure to comply with the statute. Any other conclusion would effectively constitutionalize all tort claims against a State or its subdivisions whenever their conduct is governed by any form of state regulation. Clearly, the Due Process Clause was not intended and has never been interpreted to have such a broad effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MYRA JO COLLINS,

Petitioner,

—v.—

CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The Texas Civil Liberties Union is one of the ACLU's state affiliates.

The ACLU has long worked to defend basic constitutional rights and, in so doing, has filed numerous briefs with this Court as counsel for a party or as *amicus curiae* in many cases requiring construction of 42 U.S.C. §1983, the statute at issue in this case. The ACLU has been particularly concerned about the use of §1983 as a remedy for injuries which arise from inadequate municipal training and supervision.

Because this case raises important issues regarding the standards for imposing liability under §1983 for municipal training and supervision, as well as important questions regarding the kinds of activity that rise to the level of a constitutional tort, the ACLU respectfully submits this brief *amicus curiae*.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented by petitioner.

SUMMARY OF ARGUMENT

Petitioner has stated a cause of action under 42 U.S.C. §1983 against respondent city for its failure to adequately train and supervise its employees. Nothing in the legislative history of 42 U.S.C. §1983 or the prior

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

decisions of this Court supports the conclusion of the court below that an employee asserting a substantive due process claim against a municipality must demonstrate the violation of some uniquely governmental power as distinguished from its power as an employer. Section 1983 provides a remedy for all deprivations of constitutional rights which result from the arbitrary action of government, whether the government is acting in its capacity as an employer, as a legislature, or in some other capacity.

This is not to say that the existence of a voluntary employment relationship is irrelevant to the question of whether a city has acted arbitrarily, particularly where the relationship is indicative of a knowing assumption of the risks posed by dangerous work conditions. But where, as here, the inadequacy of the city's training program is unknown to an employee and directly contrary to the mandate of state law, the voluntary nature of the employment relationship in no way diminishes the city's arbitrary and deliberate indifference to the life and safety of its employees. Thus, on these facts, petitioner has stated a claim for deprivation of her husband's right to be free from bodily injury arbitrarily inflicted by the state.

ARGUMENT

I. ABUSE OF A UNIQUELY GOVERNMENTAL POWER IS NOT A PREREQUISITE FOR A §1983 ACTION

The court of appeals defined the issue presented by this case as:

> whether a plaintiff seeking recovery under §1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government -- in its capacity as employer rather than as a governing authority -- that deprives its employee of an alleged constitutional right give rise to a §1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.

Collins v. City of Harker Heights, Texas, 916 F.2d 284, 286 (5th Cir. 1990)(emphasis in original). In its subsequent discussion, the court made clear its belief that the "abuse of government power" standard requires an "abuse of [some] particular authority or obligation held by the government" as distinguished from actions which are "essentially indistinguishable from the role of a private employer." *Id.* at 288, *quoting Rankin v. City of Wichita Falls*, 762 F.2d 447, 449 (5th Cir. 1985). Reasoning that §1983 applies only to "use of governmental power on the governed, to government *qua* government," *id.* at 287, and not to actions of a city in the role of employer, the court summarily dismissed plaintiff's claims against the city for its deliberate indifference to the safety of its employees.[2]

The court below did not elaborate on the distinction between uniquely governmental action and other kinds of state action, except to suggest that arrest and detention policies, such as those at issue in *City of Canton v. Harris*, 489 U.S. 378 (1989), are uniquely governmental while employment and perhaps other kinds of policies

[2] The Fifth Circuit's reasoning is similar to that in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), another case involving an on-the-job injury to a government employee in which the court held that there was no abuse of government authority and, thus, no improper state action because the plaintiff failed to demonstrate that the state conduct complained of was of a "uniquely governmental character." *Id.* at 89 n.6.

which parallel private action are not. Whatever the distinction may be, however, there is no basis in law for imposing such restrictions on the scope of §1983.

Amici can find nothing in the legislative history of §1983 to support the proposition that §1983 was intended as a remedy only for "uniquely governmental" action, but not other kinds of action taken under color of state law. To the contrary, this Court's review of the legislative history of §1983 led it to the conclusion that "Section 1 of the Civil Rights Act [§1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Social Services of New York*, 436 U.S. 658, 700-01 (1978). As Rep. Shellabarger explained during the debates on the Civil Rights Act:

> [Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Cong. Globe, 42d Cong., 1st Sess. (1871), App. 68, *quoted in Monell*, 436 U.S. at 683.

To be sure, common law has traditionally drawn a distinction between a municipality's liability for governmental actions and its liability for nongovernmental actions. But this Court has concluded, based on the legislative history and purpose of the Civil Rights Act, that this distinction are inapplicable to §1983. *Owen v. City of Independence*, 445 U.S. 622, 644 (1980).[3] Whether

[3] As *Owen* ironically makes clear, the common law liability of munici- (continued...)

characterized as governmental or proprietary, legislative or ministerial, all municipal action is subject to the constitutional limitations made enforceable through §1983. *Id.*

Similarly, this Court has construed the "under color of state law" and "state action" requirements of §1983 broadly to encompass all kinds of governmental conduct, including conduct which parallels private action. For example, in *Griffin v. Maryland*, 378 U.S. 130, 135 (1964), the Court noted:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Id. at 135. More recently, in *West v. Atkins*, 487 U.S. 42 (1988), the Court reiterated this principle when it held that a private physician's deliberate indifference while working under contract for the state was actionable under §1983:

> . . . the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties.

Id. at 56 n.15.

[3] (...continued)
pal corporations for their proprietary or nongovernmental functions was well established when §1983 was enacted. 445 U.S. at 644. Thus, the only issue in *Owen* was whether municipalities should be similarly liable for the exercise of their governmental powers.

In accord with these decisions, this Court has held that the substantive guarantees of the due process clause invoked by petitioner apply to governmental employment relationships and may be enforced through §1983. *Monell* itself upheld an employee's right to challenge the constitutionality of a government agency's employment policies under §1983. Since that time the Court has ruled in numerous other cases in which §1983 was invoked to challenge the constitutionality of policies affecting the employer-employee relationship. *See, e.g., Rutan v. Republican Party of Illinois*, ___ U.S. ___, 110 S.Ct. 2729 (1990)(hiring and promotion policies based on political affiliation violate due process); *Rankin v. McPherson*, 483 U.S. 378 (1987)(termination of employee for speaking on issue of public importance violates due process); *Owen v. City of Independence*, 445 U.S. 622 (city counsel's false and stigmatizing charges against sheriff in the context of discharge violate liberty interest); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)(school policy requiring pregnant teachers to take leave of absence violates due process).

The only distinction between these substantive due process cases and the one now before the Court is the fact that the former cases involved intentional employment policies which were themselves unconstitutional, whereas the case *sub judice* involves an informal, but nonetheless very real, policy of deliberate indifference to the constitutional rights of employees. *City of Canton*, 489 U.S. 378, makes clear, however, that the elements of a §1983 claim are the same in both kinds of cases. It may be necessary to muster more proof to establish the existence of a policy of deliberate indifference and to demonstrate that such a policy was the moving force behind a deprivation of life or liberty but, if such a policy is proven, a city may be held liable for the injuries it causes. *Id.* at 390-92. *See also Smith v. Wade*, 461 U.S. 30, 43 n.10 (1983)(deliberate indifference is "equivalent to intent, meaning that the two are equally culpable and deserving of punishment and deterrence.").[4]

Thus, the mere fact that this case involves the employer-employee relationship does not take it out of the purview of §1983 and the lower court's conclusion to the contrary should be reversed. This is not to say that the court of appeals' focus on the employer-employee relationship is utterly irrelevant to §1983 analysis. As discussed below, such a relationship may have a bearing on whether a constitutional tort has been pled. But the fact that a claim involves the employer-employee relationship, standing alone, does not preclude liability under §1983.

II. PETITIONER HAS ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

Because the court below erroneously believed that a §1983 action required some uniquely governmental action, it did not reach the issue of whether petitioner adequately pled a deprivation of a constitutional right. *See Collins*, 916 F.2d at 287. In fact, petitioner has alleged a colorable claim that her husband was deprived

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[4] The importance of holding a city liable for its deliberate indifference to an employee's life and safety cannot be overstated. In *Owen v. City of Independence*, 445 U.S. 622, a case involving violations of an employee's due process rights, this Court recognized that:

> the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Id. at 652 (footnote omitted). The failure to train and supervise employees, such as petitioner alleges in this case, is most likely to result from such unintentional conduct on the part of several officials.

of his Fourteenth Amendment liberty interest in personal security and physical safety by the city's failure to provide minimally adequate training and supervision to its sewer workers.

The right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security has long been recognized as one of the rights protected by the Fourteenth Amendment. *Ingraham v. Wright*, 430 U.S. 651 (1977). This right to personal security does not impose an affirmative duty on the state to protect the public from invasions by private actors, *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989), but it does require the state to avoid arbitrarily inflicting injury itself. *See, e.g., Ingraham*, 430 U.S. 651; *Screws v. U.S.*, 325 U.S. 91 (1945)(construing criminal equivalent of §1983). Where state action creates a substantial risk of injury, this means that the state has a duty to take reasonable precautions, such as providing training and supervision, to help avoid unnecessary injury. Failure to take such precautions where they are readily available may, in certain circumstances, constitute precisely the kind of arbitrary government action that §1983 was intended to redress.

Thus, for example, in *City of Canton*, 489 U.S. at 392-93, this Court recognized that holding individuals in custody, and thereby cutting off their access to private aid, creates a sufficient risk of injury that the city may be held liable if it fails to take the obvious precaution of training jailers to recognize a detainee's need for medical attention. Similarly, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court held that the risks to the mentally retarded resulting from commitment to a state institution require the state to provide minimally adequate or reasonable training to the committed individuals themselves, "to ensure their safety and freedom from undue restraint." 457 U.S. at 319.

Contrary to the implications of the lower court's

opinion, the constitutional duty to provide training and supervision is not limited to the training of police forces or to situations where an individual is in state custody. The duty to provide minimal training and supervision recognized in *Youngberg* and *City of Canton* did not arise from the fact of custody itself but from the fact that custody created a substantial risk of injury, along with limited opportunities for outside relief that the state had an obligation to address if it was to avoid arbitrarily inflicting injury. Of course, holding an individual in custody is only one of many ways in which a municipality may expose an individual to a substantial risk of injury. There are a myriad of city policies, including employment policies, which may create a risk of serious harm. And, when a city pursues such policies, "the Due Process Clause requires the state to protect [the individuals involved] to the extent of ameliorating the incremental risk." *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988)(*en banc*), *cert. denied*, 489 U.S. 1065 (1989). This proposition is hardly a novel one. Indeed, the principle that the government has a constitutional duty to make reasonable efforts to protect all persons it affirmatively exposes to a risk of injury, not just those it holds in custody, has been recognized by at least six circuit courts of appeals.[5]

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[5] *See e.g., Ross v. U.S.*, 910 F.2d 1422 (7th Cir. 1990)(county policy prohibiting private individuals from attempting rescues in Lake Michigan creates unnecessary risk of injury for which the county may be held liable); *Archie*, 847 F.2d at 1223 (*dicta*); *Gregory v. City of Rogers, Ark.*, 921 F.2d 750 (8th Cir. 1990)(officer's arrest of driver and decision to allow intoxicated passengers to drive car created unreasonable risk of injury actionable under §1983); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989)(city liable for policies which create unsafe employment conditions); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990)(school liable for policies which subjected students to increased risk of sexual abuse); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 341 (1990)(officer liable for causing woman to

(continued...)

This same principle applies to the instant case. The operation of a sewer system is inherently dangerous and sending workers into the sewer clearly exposes them to substantial risks of injury. Obviously a city cannot be required to eliminate all dangers from its sewers, but neither can it entirely ignore those dangers when readily available protective equipment and training could greatly reduce the risk of injury. A municipality's failure to take such minimal precautions to protect its employees from the dangers inherent in its sewer system is just as offensive to the goals of §1983 as a city's failure to protect its detainees by training its officers to recognize when detainees require medical assistance. The Constitution guarantees all persons, sewer workers and detainees alike, the right not to be deprived of their lives through the arbitrary action of government.[6]

Although the Fifth Circuit erred in attempting to draw a bright line rule precluding municipal employees from obtaining redress for injuries caused by inadequate training, that is not to say that the employer-employee relationship is irrelevant to the question of whether a particular failure to train violates the Constitution. In certain circumstances, the employment relationship may be highly relevant. Where, for example, no practical

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[5] (...continued)
be abandoned at night at side of dangerous highway); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)(*en banc*), *cert. denied*, 109 S.Ct. 1227 (1989)(state's failure to adequately supervise foster home placements creates unreasonable dangers for which state may be held liable); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (failure to supervise use of patrol car by jail inmate actionable under §1983).

[6] If sending prisoners into unsafe sewers constitutes cruel and unusual punishment actionable under §1983, *see e.g., Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990), then surely sending municipal workers, who cannot be punished at all, into unsafe sewers is also actionable under §1983.

means exists to eliminate the dangers inherent in a particular job, an employee's knowing and voluntary decision to remain on the job and accept the risk of injury clearly impacts upon the reasonableness of the state's action in allowing the risk of injury to exist.[7]

Walker v. Rowe, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986), is a case in point. There, prison guards injured in a prison riot sued the state for failing to maintain a suitably safe prison facility. The Court noted that there were legitimate financial reasons why the state chose to accept a certain level of risk in its prisons. The court also noted that the guards were aware of the danger and could have protected themselves by looking elsewhere for work. In light of those facts, the court concluded that the state's decision to tolerate a certain level of risk was neither unreasonable nor reckless:

> The state must protect those it throws in snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state circus, the state need not separate Daniel from his charges with an impenetrable shield.

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[7] As the Court noted in Youngberg v. Romeo:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

457 U.S. at 320 (1982).

Id. at 511.

This same "assumption of the risk" analysis could also be used to explain the result in *Rankin v. City of Wichita Falls*, 762 F.2d 447, without the necessity of invoking vague distinctions between governmental and nongovernmental state action. According to the Fifth Circuit, the dangers of the waste treatment plant were "patent," *id.* at 446, and the employee who drowned certainly knew that he could not swim, yet he voluntarily agreed to work at the plant anyway. In those circumstances, the city's failure to provide safer working conditions may have been sufficiently reasonable to avoid the imputation of arbitrary action to the city.[8]

On the other hand, the voluntariness of an employee's association with the city may be irrelevant to the reasonableness of the city's action where the employee is unaware of the danger he faces. In such circumstances, an employee cannot accept the risk or protect himself from it any more than a prisoner can protect himself in a dangerous prison cell.[9] For example, in *Cornelius v.*

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[8] This same assumption of the risk analysis could also be used to explain the results in several other cases relied upon by the court below, including *de Jesus Benevides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C.Cir. 1986).

[9] This is the error in the analysis in *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991). It assumes that the employees will always be aware of the dangers inherent in their employment and can choose to accept the risks of injury. That may be true with respect to police and fire department positions, but it is not necessarily true in other cases.

A city's failure to give its employees notice of serious risks inherent in their employment may also deprive an employee of procedural due process. *Cf. Burns v. United States*, 59 U.S.L.W. 4625 (June 13, 1991)(No. 89-7260). Where the risk of erroneous deprivation of life or liberty is great and notice of the risk can easily be provided be-

(continued...)

Town of Highland Lake, Ala., 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784 (1990), a town employee was kidnapped and terrorized by state prisoners assigned to the town community work squad. The plaintiff asserted a §1983 claim against the town for its deliberate indifference in supervising the work squad and against the prison officials for their deliberate indifference in assigning violent criminals to the squad. Neither of these dangers was readily apparent to Ms. Cornelius and her voluntary decision to work as town clerk can hardly be described as an acceptance of the risk posed by the defendants' inadequate supervision of the work squad. In these circumstances, the town's deliberate indifference represents precisely the sort of abuse of government power actionable under §1983 and Ms. Cornelius' status as a voluntary employee is simply irrelevant to that determination.[10]

This is not to say that a municipality may avoid liability simply by ensuring that the dangers created by

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[9] (...continued)
fore an individual begins work, procedural due process would require that the worker be given notice and the opportunity to make an informed decision as to whether to accept the employment. Certainly a city should not be able to treat an employee as though he had volunteered to risk his liberty when he has not. *Cf. Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990).

[10] Under this analysis, the Eleventh Circuit's use of "special relationship" and "special danger" analysis to uphold Ms. Cornelius' cause of action is unnecessary. Ms. Cornelius alleged a failure to supervise which was so likely to cause injury and so utterly without justification, that it could reasonably be called a policy of deliberate indifference for which the town was responsible. The town could be held liable to any person actually injured by such a policy, whether courthouse employee, or passerby. It is the utter lack of justification for the grave danger created by the town's failure to supervise that renders the town liable, not the fact that there is something "special" about the danger or "special" about the town's relationship with Ms. Cornelius. *See Archie v. City of Racine*, 847 F.2d at 1223.

its inadequate training and supervision are well known to its employees. It may happen that the need for training is so obvious and so easily accommodated that a city can be said to be deliberately indifferent to the safety of its employees whether or not workers can be found who are willing to assume the risk of inadequate training. Such would be the case where, as here, the state legislature has determined that specific safety precautions must be provided regardless of workers' willingness to do without them.

In the end, attempts to devise bright line rules regarding the right to safe treatment based on an individual's relationship with the city -- whether as employee, detainee, or some other "special relationship" -- are not analytically useful. *See Archie*, 847 F.2d at 1223. The notion of due process is a:

> concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Betts v. Brady, 316 U.S. 455, 462 (1942)(footnote omitted). The "totality of facts" which must be considered in any failure to train or supervise case will necessarily include examination of the financial and practical aspects of more or different training, the extent to which the city could foresee serious injury arising from its allegedly inadequate training program, as well as the individual's ability to protect him or herself from the dangers created. All of these issues are subsumed in the ultimate

question, whether the city's action amounts to deliberate indifference to the life or safety of the injured party. The high level of proof necessary to establish such indifference guarantees that §1983 will not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Nevertheless, in cases such as this one, where the allegation is made that municipal employment policies senselessly subject employees (or others) to a high degree of risk, there is no reason why the municipality should not be held to answer in damages for serious injuries caused by those policies, just as it must answer in damages for other policies which deprive citizens of their life, liberty, or property.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to the district court for trial of petitioner's §1983 claims.

Respectfully submitted,

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